

106 FERC ¶ 61,179
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

California Independent System Operator Corporation Docket No. ER03-1102-000

ORDER ON TARIFF AMENDMENT NO. 55

(Issued February 20, 2004)

1. The Commission directs the California Independent System Operator Corporation (CAISO or ISO) to modify the behavioral rules proposed in Amendment No. 55 to be consistent with the Commission's behavioral rules order in Docket Nos. EL01-118-000 and EL01-118-001.¹ In this regard, we accept, subject to the Commission's acceptance of a CAISO filing that demonstrates that the CAISO has established an independent Governing Board in compliance with the Commission's orders in Docket No. EL01-35-000, et al.,² the CAISO's proposal to charge pre-defined penalties for certain objectively identifiable behaviors, direct modification of Amendment No. 55 to conform it to the Commission's MBR Tariff Order,³ and otherwise provide direction to the CAISO. We also direct the CAISO to make a compliance filing within 60 days of the date of this order as discussed herein. This order represents the first application of the Commission's recently adopted behavioral rules and benefits customers in the CAISO markets by providing a reasonable approach to investigating and sanctioning anticompetitive behavior.

I. Background

¹ Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003) (MBR Tariff Order).

² Mirant Delta, LLC, et al. v. California Independent System Operator, Corp., 100 FERC ¶ 61,059 (2002) (Mirant), reh'g granted in part and denied in part, 100 FERC ¶ 61,271, reh'g denied, 101 FERC ¶ 61,078 (2002).

³ See supra note 1.

2. On July 22, 2003, the CAISO filed its proposed Oversight and Investigations Program (O&I Program) proposal as Amendment No. 55 to the CAISO's Open Access Transmission Tariff (ISO Tariff).⁴ The CAISO proposes tariff revisions to implement the O&I Program proposal in three parts: (1) by adding an Enforcement Protocol as a stand-alone Attachment to the ISO Tariff, (2) by incorporating additional conduct rules in the main body of the ISO Tariff to address specific bidding and scheduling behavior, and (3) by revising the existing ISO Market Monitoring and Information Protocol (MMIP) under the ISO Tariff to complement the Enforcement Protocol and to correct various outdated provisions of the MMIP. The CAISO also proposes the addition of Section 20.3.5 to the ISO Tariff to govern the release of commercially sensitive information to several Federal and State "Oversight and Enforcement Agencies" (*i.e.*, the Commission, the U.S. Department of Justice or any of its offices, the California Department of Justice or any of its offices, the Public Utilities Commission of the State of California (CPUC), or the California Electricity Oversight Board (CEOB)) (Oversight and Enforcement Agencies).

3. The Enforcement Protocol is composed of seven parts: (1) Objectives, Definitions, and Scope (EP 1); (2) Rules of Conduct (EP 2); (3) Process for Investigation and Enforcement (EP 3); (4) Process for Prohibiting Detrimental Practices and Market Manipulation (EP 4); (5) Administration of Penalties (EP 5); (6) No Limitations on Other Rights of ISO (EP 6); and (7) Amendments (EP 7). Under the principal element of the Enforcement Protocol (*i.e.*, the Rules of Conduct under EP 2), the CAISO proposes to monitor, investigate and enforce nine Rules of Conduct.⁵ For each of its nine Rules of Conduct, the CAISO provides a general prohibition or General Rule, ascribes a maximum fixed Standard Penalty amount per event for rule violations and lists any Special Penalties, Exceptions or Limitations to the rule. In addition to the maximum fixed Standard Penalty, for five of the nine Rules of Conduct, the ISO also imposes a variable penalty for violations.

4. On September 22, 2003, the Commission issued an order accepting and

⁴ The CAISO states that its O&I Program consists of five elements, only four of which the ISO requests the Commission to approve.

⁵ The nine Rules of Conduct set forth in EP 2.2 through EP 2.10 are as follows: (1) comply with operating orders; (2) submit feasible energy and ancillary service bids and schedules; (3) no physical withholding; (4) no economic withholding; (5) comply with availability reporting requirements; (6) provide factually accurate information; (7) provide information required by the ISO Tariff; (8) no detrimental practices; and (9) no market manipulation.

suspending Amendment No. 55 for five months, to be effective February 21, 2004, subject to refund and further Commission order.⁶

II. Notice of Filing and Responsive Pleadings

5. Notice of the CAISO's filing was published in the Federal Register, 68 Fed. Reg. 46,177 (2003), with comments, interventions and protests due on or before August 12, 2003. By notice dated August 8, 2003, an extension of time was granted to and including August 18, 2003 to file comments.

6. Interventions, comments, protests, motions and requests for hearing and technical conference were filed. The CAISO filed an answer in which it agreed to revise proposed Amendment No. 55 to reflect certain intervenors' comments. On September 16, 2003, the California Municipal Utilities Association (CMUA) filed an amended protest and answer.

III. Discussion

A. Procedural Matters

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the CAISO's answer as it has assisted us in our determination; however, we are not persuaded to accept CMUA's answer and, therefore, will reject it.

B. Overview

1. The Relationship between the Proposed ISO Tariff Sections

8. To facilitate implementation of its O&I Program, the CAISO states that it must add the proposed Enforcement Protocol to the ISO Tariff, revise certain provisions found in the main body of the ISO Tariff relating to grid operations, and modify the existing MMIP section of the ISO Tariff to complement the proposed Enforcement Protocol.

9. The MMIP was approved by the Commission on December 17, 1997.⁷ The MMIP

⁶ See California Independent System Operator Corporation, 104 FERC ¶ 61,308 (2003).

⁷ Pacific Gas and Electric Company, et al., 81 FERC ¶ 61,320 at 62,471 (1997).

sets forth, among other things: (1) the duties and responsibilities of the CAISO market monitoring units (i.e., the Department of Market Analysis (DMA),⁸ the proposed name for the Market Surveillance Unit (MSU), and the Market Surveillance Committee (MSC)); (2) the criteria used in selecting market monitors; (3) the hierarchy of these units to reflect their accountability; and (4) what information is to be monitored, reported and disseminated. In addition, the MMIP lists and defines practices subject to scrutiny, such as abuse of reliability must-run unit status, gaming and certain anomalous market behavior. Corrective action provisions under the existing MMIP, for any type of bad behavior, limit the DMA to making recommendations to the appropriate regulatory agencies. In revising the MMIP in this filing, the CAISO states that the MMIP will now provide the general framework for the operation of the DMA and the MSC but is not intended to limit the activities or remedies available to these entities or to the ISO as a whole elsewhere in the ISO Tariff.

10. In Amendment No. 55, the CAISO proposes that the Commission allow it to penalize market participants who violate its proposed Rules of Conduct, which are based on operational requirements found in the existing ISO Tariff, and by including these Rules of Conduct (and associated penalties) in the proposed Enforcement Protocol. Thus, the CAISO intends the proposed Enforcement Protocol to reinforce the MMIP and allow the ISO, rather than the DMA, to impose penalties on bad actors for ISO Tariff violations. In turn, the CAISO revises the MMIP to discard references to outdated terms and reflect that, to the extent that there are inconsistencies between the proposed Enforcement Protocol and the MMIP, the proposed Enforcement Protocol will prevail.

11. Additionally, in Amendment No. 55, the CAISO proposes other ISO Tariff revisions to prohibit specific types of gaming strategies identified in the Enron Memos. These revisions modify various sections of the main body of the ISO Tariff relating to grid operations. For instance, the CAISO proposes to prohibit Circular Scheduling, which was identified as an aberrant gaming strategy in the Show Cause Order⁹ and modifies Section 7.3.1.5.3 of the ISO Tariff to state that "Scheduling Coordinators shall not receive a Usage Charge payment for schedule flows in a counter direction if such scheduled flow is the result of a Circular Schedule." The ISO also adds the definition of

⁸ In this order, we refer to the DMA generally to indicate the individuals in the CAISO which have MMU responsibilities, which may also include the Compliance Unit. Later in this order, we direct the CAISO to identify all personnel with MMU responsibilities.

⁹ American Electric Power Corporation, et al., 103 FERC ¶ 61,345 (2003) (Show Cause Order), reh'g pending.

“Circular Schedule” to the Master Definitions Supplement under the ISO Tariff. Market participants who violate this proposed ISO Tariff revision and engage in Circular Scheduling will be subject to penalty under the proposed Enforcement Protocol.

2. How the Commission Intends Market Monitoring To Operate in CAISO Markets

12. On November 20, 2001, the Commission instituted a proceeding in Docket No. EL01-118-000, pursuant to section 206 of the Federal Power Act (FPA), in which the Commission proposed to condition the grant of market-based rate authority to public utilities that sell energy and ancillary services at wholesale in interstate commerce by expressly prohibiting sellers from engaging in anticompetitive behavior or abuses of market power.¹⁰ On June 26, 2003, the Commission proposed to modify tariff provisions by identifying more precisely and comprehensively the transactions and practices that would be prohibited under sellers’ market-based rate tariffs and authorizations.¹¹

13. On November 17, 2003, the Commission issued the MBR Tariff Order amending market-based rate tariffs and authorizations. In the MBR Tariff Order, the Commission, in establishing a clear benchmark governing market participant conduct, conditioned all new and existing market-based rate tariffs and authorizations on sellers’ compliance with six Market Behavior Rules concerning: (i) unit operations; (ii) market manipulation; (iii) communications; (iv) reporting; (v) record retention; and (vi) related tariff matters.¹² The MBR Tariff Order required market-based rate sellers to amend their tariffs to include these behavioral rules.

14. In the MBR Tariff Order, the Commission generally stated that it is appropriate to authorize MMUs to enforce certain ISO/RTO tariff matters concerning market behavior (with appeal rights to the Commission) for matters that are clearly set forth in the tariffs of the ISOs/RTOs in which the behavior is objectively identifiable and in which the violations have clear Commission-approved sanctions set forth in the tariff.¹³ In the MBR Tariff Order, the Commission also stated that all other aspects of tariff related

¹⁰ Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 97 FERC ¶ 61,220 (2001).

¹¹ Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 103 FERC ¶ 61,349 (2003).

¹² MBR Tariff Order at P13-130.

¹³ MBR Tariff Order at P 182.

enforcement will be the responsibility of the Commission regardless of whether the alleged violation occurs in ISO/RTO administered markets or bilateral markets.¹⁴ The Commission stated that the role of the MMU is to provide valuable information to the Commission to assist it in carrying out its statutory duties. The Commission emphasized the need for a close working relationship between the Commission and MMUs with the Commission continuing its statutory role of tariff interpretation and enforcement. We will apply the standard for determining whether to allow an MMU to administer certain behavior-related tariff provisions that was set forth in the MBR Tariff Order to the CAISO's proposed Amendment No. 55, as discussed below.

15. As stated in the MBR Tariff Order, we believe that clear rules and structural corrections to improve markets and reduce opportunities for manipulation are the best way to improve market design and assure market integrity. To the degree this filing contains proposals that properly clarify and improve existing rules, we will approve such changes. However, to the degree that this filing contains proposals that are unclear or overly broad, we will require that they be revised to better provide the "rules of the road" which may be administered by the MMU (the DMA) or by the Commission in areas of policy determination or requiring subjective judgment as described in our MBR Tariff Order. Moreover, to the degree that we can provide uniformity and clarity for market participants through consistent requirements, we will direct the CAISO to replace language in proposed Amendment No. 55 which is duplicative of the concepts in the MBR Tariff Order with the language in the MBR Tariff Order. For example, it is our intention that the concepts and language in Market Rule 2 of the MBR Tariff Order be used as the Commission's "anti-manipulation" standard.

16. We believe that the MMU in an ISO/RTO market plays an invaluable role: monitoring the market; helping to identify improvements to rules and market design; providing the Commission with a meaningful on-going flow of information about the market; and helping to assure compliance with market rules. As long as there are appeal rights to the Commission, we believe it is appropriate to allow the MMU to administer certain behavior-related tariff provisions and to charge penalties for certain behavior in the first instance as long as the MMU has the requisite independence and authority within the ISO/RTO structure to carry out this function.¹⁵ However, where policy issues are

¹⁴ Id.

¹⁵ If the MMU is to be vested with the ability to administer certain behavior-related tariff provisions and to charge penalties for certain behavior, the MMU must be adequately independent to be able to carry out these activities without interference or instruction from other ISO/RTO personnel or non-MMU supervisors. Of course, as set forth herein, the ISO must also be independent.

implicated or the question of whether a tariff violation has occurred is not an objective determination made by the MMU pursuant to Commission-approved tariff provisions, it is our statutory responsibility to address the question.

17. We will approach the issues presented by Amendment No. 55 as follows. First, we will discuss the general framework of the proposed Enforcement Protocol and Penalty Structure. We will turn then to each of the nine Rules of Conduct (EP 2.2 through EP 2.10) which will be followed by a discussion of the remaining provisions of the Enforcement Protocol. Then, we will address the other conduct rules that the CAISO proposes to add to the main body of the ISO Tariff to address specific types of aberrant behavior, the proposed revisions to the existing MMIP, and the proposed Section 20.3.5 to the ISO Tariff governing the release of commercially sensitive information to Oversight and Enforcement Agencies. Finally, we will address the need for the ISO to honor its commitment to post an updated, conformed ISO Tariff on its website.

C. Enforcement Protocol

1. General Framework

18. In the proposed Enforcement Protocol, the CAISO lists nine Rules of Conduct (EP 2.2 - EP 2.10). Under each of these Rules of Conduct, the ISO sets forth a General Rule and a Standard Penalty. Under certain Rules of Conduct, it also provides Special Penalties and/or Exceptions/Limitations. In addition, the ISO provides, among other things, a general process for investigation and enforcement (EP 3); a process for prohibiting detrimental practices and market manipulation (EP 4), including whether a behavior should be deemed a violation of a Rule of Conduct; and a process for the administration of penalties. Under the O&I Program proposal, the Commission and other regulatory agencies (and agencies with certain statutory responsibilities over the ISO) may be asked to participate in investigations initiated by the CAISO at the ISO's discretion.¹⁶

19. In keeping with the MBR Tariff Order, we will require the CAISO to modify its proposed Enforcement Protocol to conform to our delineation of market monitoring responsibilities and determinations regarding the types of behavior that should be subject to potential sanctions. As stated in the MBR Tariff Order, MMUs serve the essential function of the Commission's "eyes and ears" in the market in which they reside.¹⁷

¹⁶ In addition, the CAISO proposes to disseminate confidential information via a secure regulatory data server to all of the named Oversight and Enforcement Agencies.

¹⁷ MBR Tariff Order at n.121.

Accordingly, herein, we will allow the DMA to administer certain behavior-related tariff provisions and to charge penalties for certain behavior. The DMA must administer such responsibilities independently and must not involve other ISO personnel; further, the DMA must be aligned with the framework that we have established in the MBR Tariff Order and must contain appeal rights to the Commission. Beyond the specific rules which we will allow the DMA to administer in the first instance, we will require the CAISO to review the ISO Tariff, as modified in accordance with this order, and file appropriate revisions which are consistent with the approach set forth in the MBR Tariff Order regarding the scope of behaviors that the Commission has made subject to potential sanction and remedies.

2. Proposed Penalty Structure

20. For each of the nine Rules of Conduct (EP 2.2 – EP 2.10), the CAISO sets forth a General Rule and a maximum fixed Standard Penalty and for certain of the Rules of Conduct the CAISO also proposes Special Penalties and/or Exceptions and/or Limitations. The maximum fixed Standard Penalty amounts range from \$10,000 to \$110,000 per event for violations of the Rules of Conduct and may include additional pass-through penalty amounts such as applicable Western Electricity Coordinating Council (WECC) penalties.¹⁸ For five of the nine proposed Rules of Conduct (Enforcement Protocol Sections 2.2., 2.4, 2.5, 2.8 and 2.9), the CAISO proposes to assess both a fixed penalty and a variable penalty. Variable penalty amounts are based on criteria such as MWh of energy not provided (e.g., for non-compliance with an operating order) or benefits received by a market participant for engaging in detrimental market practices or market manipulation. To determine the severity of a penalty for a specific violation, the CAISO states that it will consider as many as nineteen factors set forth in Sections 5.1 (Assessment; Factors to be Considered) of the Enforcement Protocol (e.g., whether other entities were harmed and the extent of this harm, the frequency of the violation, and the market participant's history of prior misconduct).¹⁹ According to the

¹⁸ The largest stated penalty amount proposed by the CAISO is the proposed Special Penalty for failure to comply with operating orders (EP 2.2). The proposed maximum fixed penalty of \$110,000 per event (which can be increased according to the MWhs not curtailed or penalties incurred by the ISO) will be assessed when a Utility Distribution Company (UDC) fails to heed an instruction to curtail load during a System Emergency pursuant to Sections 4.5.3 and 2.3.1.2.1 of the ISO Tariff or when a market participant fails to comply with an operating order and that failure contributes to or prolongs an outage as described in Section 2.3.2.9.3 of the ISO Tariff.

¹⁹ For example, the failure of a UDC in the CAISO Market to comply with an operating order to curtail 100 MW of firm load for one hour during a System Emergency would be subject under EP 2.2 to a maximum fixed Special Penalty of up to \$110,000 per

CAISO, its proposed penalty provisions are based on factors similar to those approved in several other organized markets,²⁰ and its standards for adjusting the levels of penalties are consistent with the standards detailed in the SMD NOPR.²¹

21. Section 5.3 (Enhancement) of the proposed Enforcement Protocol allows the ISO to triple the maximum amount of a fixed penalty for violations of all Rules of Conduct (except the Special Penalties under EP 2.2(c)) if the violation occurred during a System Emergency or if the violation is part of a continuing pattern of the same violation for which one or more monetary penalties have been previously imposed.

22. The CAISO proposes that any penalty amounts it collects under the Enforcement Protocol be distributed to all Scheduling Coordinators, after first subtracting reasonable costs incurred by the ISO for payments made to outside vendors for equipment or services that are used to investigate violations and administer penalties.²² The CAISO proposes holding the collected penalty amounts in a trust account until the end of each calendar year. At the end of each year, and after subtracting the reasonable costs incurred as described, the CAISO proposes to allocate the remainder, including accrued interest, to Scheduling Coordinators in proportion to their Metered Demand (including exports) in

event and an amount equal to \$1000 per MWh of firm load not curtailed. The ISO would determine the specific amount of the penalty amount to be assessed, up to the maximum amount, by considering any of the nineteen factors enumerated in EP 5.1 (e.g., the frequency of violations by this particular UDC, the degree to which this UDC profited from the violation, whether the violation was inadvertent and unintentional, or willful, or grossly negligent and whether the violation occurred during a System Emergency). In this example, the UDC could face a maximum penalty of \$210,000 for the single event described herein, in addition to any applicable WECC penalties.

²⁰ We note that if the example detailed in the preceding footnote (i.e., a UDC fails to implement an operating instruction to curtail 100 MW of firm load for one hour during a System Emergency) occurred in the PJM Interconnection, LLC (PJM) market and the PJM MMU identified this event as part of a significant market problem, the PJM MMU would immediately report the incident to its Board and to the Commission for further investigation. The Midwest ISO imposes a \$50 per kW charge, up to \$10,000 per day, on a transmission customer that fails to curtail or interrupt in response to an ISO directive.

²¹ Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, 67 Fed. Reg. 55,452 (Aug. 29, 2002), FERC Stats. & Regs. ¶ 32,563 (2002) (SMD NOPR).

²² CAISO Filing Transmittal Letter at 57.

the calendar year. Any excess funds will be held by the CAISO in a Surplus Account. The CAISO states that this approach provides no incentive to impose penalties in order to reduce the Grid Management Charge (GMC). Therefore, the CAISO claims that this proposal holds the GMC constant and allows it to recover the costs of enforcing its proposed Rules of Conduct from the market participants who violate them.

Intervenors' Comments on the Proposed Penalty Provisions

23. CMUA argues that, contrary to the ISO's assertion, no other ISO has similar penalties. The CMUA notes that, while the CAISO cites to the Midwest ISO's ability to assess penalties of up to \$10,000 per day for failure to comply with operating instructions (as well as the Midwest ISO's ability to withhold transmission revenues), the CAISO proposes a Standard Penalty of \$10,000 per event for similar conduct without providing an explanation as to how it arrived at a \$10,000 penalty amount.

24. Indicated Generators²³ argue that, compared to other penalty provisions approved by the Commission, the CAISO's proposed penalties are draconian. The Indicated Generators note that the sanctions imposed by the ISO New England usually range from \$1,000 to \$5,000 per event while the penalties assessed by the New York ISO are tied to locational marginal price and the quantity of the infraction.²⁴

25. The City of Santa Clara, California, Silicon Valley Power (Santa Clara) claim that, if the CAISO's \$110,000 penalty and "enhancement," which could triple the fixed penalty, applies to each five-minute scheduling interval, it is possible that the CAISO could levy penalties of some \$31,680,000 per day on a single market participant. According to Santa Clara, if tripled, the amount could grow to \$95,040,000 per day on a single market participant on the basis of completely unproven allegations of harm. Santa Clara argues that the proposed rules, with their stringent penalties, will not cure the currently dysfunctional market. Santa Clara agrees with the development of market rules of conduct but requests that the suggestions it provides for alternate rules be considered.

26. The Metropolitan Water District of Southern California (Metropolitan) asserts that

²³ The Indicated Generators include Reliant Energy Power Generation, Inc.; Reliant Energy Services, Inc.; Mirant Americas Energy Marketing, LP; Mirant California, LLC; Mirant Delta, LLC; Mirant Potrero, LLC; Dynegy Power Marketing, Inc.; El Segundo Power LLC; Long Beach Generation LLC; Cabrillo Power I LLC; Cabrillo Power II LLC; and Williams Energy Marketing & Trading Co.

²⁴ Citing ISO New England Market Rule 13, Appendix A and New York ISO Tariff, Attachment H, Section. 4.3.3.

the CAISO's penalties should be limited to the market impact of the violation at issue. Metropolitan argues further that the Commission should order the ISO to implement an approach similar to the Midwest ISO where no penalty is imposed unless the proscribed conduct is found to have an adverse impact on prices.

CAISO's Answer

27. In its Answer, the CAISO states that, given the history of the California energy market, its proposed penalty amounts are necessary to send a strong signal to market participants that aberrant market behavior will not be tolerated. In addition, the CAISO states that its proposed penalties meet the primary goal of the Enforcement Protocol: deterring conduct that is "inconsistent with the fair and efficient operation" of ISO energy markets. The CAISO further claims that, since it is the largest independent system operator in terms of the amount of load served in its Control Area, the financial impact of malfeasance is potentially far greater in California than in some other control areas. Thus, the ISO argues that the imposition of larger penalties is warranted. Moreover, the CAISO argues that the penalty amounts set forth in the Enforcement Protocol constitute maximum penalties for violations of its Rules of Conduct. The ISO states that Section 5 of the Enforcement Protocol clarifies that it will determine the penalty to be applied in specific instances by considering a number of possible mitigating factors. In response to Metropolitan, the CAISO claims that Metropolitan's approach would allow market abusers a "free pass" in every instance in which a violation occurs but no showing can be made that the violation had a palpable effect on market prices.

Commission's Determination

28. We direct the CAISO to refile the Enforcement Protocol as discussed below.²⁵ Until such time as the CAISO files and the Commission accepts the CAISO's demonstration of independence,²⁶ this Commission will be the enforcer of the General Rules of the Enforcement Protocol. Thus, in its compliance filing, the CAISO should specify that enforcement lies with this Commission. Concurrent with the CAISO's filing demonstrating its independence, the CAISO may file Enforcement Protocols that will allow the DMA to administer certain behavior-related tariff provisions and to charge penalties for certain behavior consistent with the direction provided herein. In keeping with the MBR Tariff Order and our direction above that the ISO must modify its proposed Enforcement Protocol to conform to our delineation of market monitoring responsibilities, we direct the ISO to clarify that any sanctions that we allow the ISO to assess must be assessed by an independent MMU. Throughout proposed Amendment No. 55, the ISO refers to the ISO as having the ability to administer the Enforcement Protocol. We direct the ISO to revise this language to clarify that the Enforcement Protocol will be administered by the DMA independently and not by other ISO personnel and, specifically, to replace any references to the ISO in this regard with the DMA. As discussed herein, while the independence of the MMU is critical, the independence of the ISO Governing Board is paramount.

29. The regulatory framework in the CAISO's markets should include the tools to deter clearly identified abuses and to promote proper behavior. While we believe in large part, as discussed elsewhere in this order, that the sanctionable conduct identified by the CAISO in each General Rule of the Rules of Conduct is reasonable, we have concerns with the level and administration of the proposed penalties. First, we find that many of the proposed penalties are not commensurate with the conduct to be deterred and, therefore, are not just and reasonable. Since the proposed Rules of Conduct are intended to ensure the fair and efficient operation of the CAISO market, the penalties should be designed to deter conduct that is inconsistent with the fair and efficient operation of the markets. Where the violation could result in conduct that could be harmful to the reliability of the grid, it would be appropriate for the penalty to be significantly higher to serve as a deterrent for the conduct. However, the penalties should not be so high that they are not commensurate with the targeted conduct and, thus, are not just and reasonable. We direct the CAISO to specify (using the factors we approve below) the

²⁵ See infra P 154.

²⁶ See supra note 2.

exact penalty amount to be imposed for each infraction and provide an explanation for the level of each of those proposed penalties. Second, we note that while the CAISO bases its Standard Penalty in Enforcement Protocol Sections 2.2 through 2.10 on an “event,” the CAISO fails to identify that term. The CAISO is directed to identify for each of the General Rules and associated penalties whether, for example, “event” has the meaning of an hour or a day. Next, we find that the CAISO’s proposal affords the ISO too much discretion in determining what constitutes a violation of the Rules of Conduct. For example, in E.P. 2.2(b), the CAISO provides examples that may constitute a violation of the General Rule in 2.2(a). While the examples appear reasonable, they are examples only and do not constitute an exhaustive list. In the MBR Tariff Order, the Commission did not afford such open-ended discretion to an MMU.

30. We also note that the CAISO has structured its Enforcement Protocol to afford it the discretion to consider as many as nineteen factors under EP 5.1 (Assessment; Factors to be Considered) in determining the specific penalty to be assessed up to the maximum penalty calculated for each of the nine Rules of Conduct. For example, the CAISO may impose a sanction up to the maximum penalty (*i.e.*, triple the maximum amount of any fixed penalty stated for a violation of EP 2.2 through EP 2.10)²⁷ based on the deterrent effect the penalty is likely to have on similar conduct by other market participants and the appropriateness of the penalty to the market participant’s business. CAISO may also consider whether the violation was inadvertent and unintentional, or willful, or grossly negligent and whether the market participant was acting alone or in concert. We believe that the ISO Tariff should provide for a system of specified increasing penalties that will be administered by the DMA, rather than the DMA having the discretion to subjectively determine levels. The CAISO is limited, however, to including in the ISO Tariff only specific penalty amounts for objectively identifiable behavior. Considerations such as whether a behavior is inadvertent, unintentional, or willful are not for the DMA to determine but are for this Commission to decide in the course of its investigations.

31. Thus, consistent with the MBR Tariff Order which requires, among other things, that the behavior for which an MMU may assess penalties be objectively identifiable and that this behavior correspond to “clear” Commission-approved sanctions, we direct the CAISO to limit the factors the DMA will consider in determining the severity of penalties for “objectively identifiable” violations to the following: (1) whether the violation

²⁷ Pursuant to proposed EP 5.3, the ISO may triple the amount of the fixed penalties for a violation of EP 2.2 through EP 2.10 under the following circumstances: (1) if the violation occurred during a System Emergency; or (2) if the ISO determines that the violation is part of a continuing pattern of the same violation for which one or more monetary penalties have previously been imposed upon the market participant. Penalties under E.P. 2.2(c) are not subject to this enhancement.

occurred during a period in which the ISO has declared a System Emergency, warning or alert; (2) the frequency of the violation; and (3) the duration of the violation. All other factors should be monitored and reported by the DMA directly to the Commission. As discussed above,²⁸ we also direct the CAISO to specifically state the penalty amount to be imposed for each infraction and the specific amount to be assessed for each “enhancement” under EP 5.3 and demonstrate how use of such an “enhancement” is consistent with penalty provisions we have approved for other ISOs.

32. Moreover, any other provisions under EP 5 (Administration of Penalties) that are contrary to the MBR Tariff Order should be revised in the ISO’s compliance filing. For example, in EP 5.6 (Time Limitation), the ISO proposes that “no penalties may be assessed by the ISO under this Protocol more than three years after discovery by the ISO of the underlying violation.” We find that it is not reasonable for the ISO to assess penalties three years after the discovery of behavior which is objectively identifiable. Therefore, we direct the ISO to revise this provision to state that the DMA may assess a penalty under this Protocol up to a year after discovery of a violation but no later than three years after the date of a violation.

33. With respect to Metropolitan’s suggestion to limit penalties to violations that adversely affect market prices, we disagree. The integrity of the CAISO market, in part, depends upon market participants adhering to market rules. We require market participants to follow the rules regardless of whether a failure to do so can be associated directly with adverse affects on market prices. The integrity of the marketplace and the reliability of service rendered are tied to confidence that the rules are being followed.

Intervenors’ Comments to the Allocation of Penalty Proceeds

34. The California Department of Water Resources State Water Project (CDWR) contends that the ISO intends to reserve to itself unlimited discretion to retain penalties by proposing that excess penalty amounts that are not allocated among Scheduling Coordinators be credited to the Surplus Account. CDWR asserts that, since the ISO is a regulated entity, it must be accountable for its expenditures and allocations of market participants’ money. CDWR argues that, particularly in the context of applying penalties to others, the ISO should be held to strict standards of compliance when administering market participants’ funds.

35. Indicated Generators object to the ISO’s disbursement of penalty proceeds to Scheduling Coordinators in proportion to their Metered Demand. Since virtually all of the proposed penalties are aimed at sellers, Indicated Generators believe that the

²⁸ See supra P 29.

proposed distribution plan would lead to penalty proceeds largely from sellers flowing primarily to load. A more equitable plan, according to the Indicated Generators, would be a penalty disbursement that is distributed monthly to all Scheduling Coordinators regardless of their Metered Demand, as long as those Scheduling Coordinators have not been assessed any penalties for that particular month.²⁹

36. Metropolitan argues that the O&I Program should not be funded through penalty proceeds. Metropolitan claims that the proposed process embodies an inherent conflict: the greater the CAISO enforcement efforts, the greater the penalty, which then funds more investigations resulting in more penalties. In addition, Metropolitan finds that the description provided by the CAISO of its penalty assessments is vague and ambiguous. Specifically, the CAISO states that it will accumulate penalties in a trust account until the end of each calendar year. According to the ISO, after the cost of investigations is deducted from this account, the balance would be distributed to Scheduling Coordinators based on their Metered Demand. The CAISO further states that any excess funds (funds not distributed to Scheduling Coordinators) would be credited to a Surplus Account. Metropolitan asks the Commission to reject the CAISO's proposed distribution of penalty proceeds and, instead, direct the CAISO to fund its O&I Program through the GMC. Alternatively, if the Commission decides against funding the CAISO enforcement efforts through the GMC, Metropolitan requests that the Commission direct the CAISO to clarify that the CAISO may only use penalty proceeds for the reimbursement of investigation expenses and all remaining funds must be distributed to Scheduling Coordinators representing Metered Demand.

37. The Automated Power Exchange, Inc. (APX) also objects to the CAISO's funding proposal and argues that earmarking penalty payments to fund the CAISO's enforcement efforts may provide the CAISO with an incentive to aggressively seek out improper behavior whether it exists or not in order to obtain funds.

38. The Transmission Agency of Northern California (TANC) asserts that the proposal fails to provide cost-control mechanisms to control, limit or reduce the monitoring costs the ISO incurs, cost which the ISO can recoup through penalty revenue pursuant to proposed Settlement and Billing Protocol Section 3.1.2.

CAISO's Answer

39. In its Answer, the CAISO responds that, considering its non-profit status, it has no incentive to penalize as much behavior as possible. To the contrary, the ISO argues that

²⁹ Citing Regulation of Short-Term Natural Gas Transp. Services and Regulation of Interstate Natural Gas Transp. Services, Order No. 637-A, Stats. & Regs. ¶ 31,099 at 31,609 (2000); CMS Trunkline Gas Co., 100 FERC ¶ 61,048 at P 97-98 (2002).

its objective is compatible with that of every other ISO, i.e., to take all steps necessary and appropriate to reliably maintain grid operations in a fair, efficient and effective manner. Therefore, the ISO states that the Commission should extend to it the authority to impose penalties consistent with the authority granted to other ISOs.

Commission's Determination

40. We believe that the cost of the O&I Program should be recovered through the GMC to allow for full disclosure and review, as funding investigations through penalty proceeds, at best, would give the appearance of impropriety. In addition, consistent with the MBR Tariff Order, the DMA will not have unfettered discretion to take enforcement action concerning a broad range of allegations. Instead, upon the Commission's acceptance of the CAISO's filing establishing an independent Governing Board,³⁰ the DMA may only undertake enforcement of violations that are clearly set forth in the ISO Tariff, in which the behavior is objectively identifiable and in which the violations have clear Commission-approved sanctions set forth in the ISO Tariff. In addition, we find that only Scheduling Coordinators that have not been found to be in violation of the Rules of Conduct under the ISO Tariff should be allocated penalty proceeds at the end of each calendar year as a credit against their portion of the GMC. Allocation to the non-offenders on this basis is a more equitable distribution method than Metered Demand. We direct the CAISO to revise its method of allocating penalty proceeds to be consistent with these findings.

3. EP 1: Objectives, Definitions and Scope

41. Under EP 1, the CAISO states that one of its primary objectives in establishing its Rules of Conduct is to provide "an appropriate process for referrals to Oversight and Enforcement Agencies." In EP 1.2, the ISO sets out the objectives of the Enforcement Protocol. In EP 1.6, the CAISO states that its Rules of Conduct will govern all market participants and the ISO. Lastly, in EP 1.9 the CAISO defines the Commission's authority under the ISO's O&I Program proposal as follows:

the FERC shall have the authority to assess the penalties specified herein, and otherwise to enforce the rules set forth in this Protocol, independently or by referral or complaint of another entity, and additionally shall have the authority to impose penalties equal to the market impact of a violation under this Protocol. . . Nothing in this Protocol shall be deemed to be a

³⁰ See infra P 154.

limitation or condition on the authority of FERC or other entities under current law or regulation.

Intervenors' Comments

42. APX proposes language to revise EP 1.6 to state that, even though a market participant submits its bid to the CAISO through a Scheduling Coordinator, the market participant (and not the Scheduling Coordinator) shall be directly subject to penalties under the respective rule. Sempra Energy (Sempra) argues that EP 1.9 is superfluous and should be deleted. Indicated Generators assert that, since the Commission cannot delegate more authority than it has, EP 1.9 should be eliminated. TANC protests the delineation of the Commission's authority to assess penalties because it unnecessarily restates the Commission's rights, or, in the alternative, it inappropriately provides the Commission with the ability to exercise rights it does not possess.

CAISO's Answer

43. In its Answer, the CAISO does not respond specifically to the issues raised by intervenors.

Commission's Determination

44. We direct the CAISO to revise EP 1 in its entirety to reflect the demarcation of enforcement responsibilities set forth in the MBR Tariff Order, as discussed earlier in this order. As the Commission stated in the MBR Tariff Order and above, the DMA should not have the discretion to determine when and whether it will inform the Commission of market violations or activities that fall outside of the scope of the behavior-related tariff provisions the Commission will allow the DMA to administer and the penalty charges that the Commission will allow it to assess. Rather, the DMA must bring such issues to the Commission's attention for a resolution consistent with the FPA. Therefore, the proposed discretionary "referrals" by the DMA to the Commission regarding alleged market violations would be inconsistent with our perspective of how market monitoring should be achieved. All alleged market violations, except those objectively identifiable

violations we allow the DMA to resolve in the first instance, must be referred to the Commission. Any revisions or additions to the Rules of Conduct and what may violate them are required to be filed as part of the ISO Tariff. Therefore, we direct the ISO to revise EP 1.2(c) accordingly.

45. The ISO relies on Scheduling Coordinators that have been certified pursuant to the provisions of the ISO Tariff to fulfill various roles and functions on behalf of market participants. Specifically, Section 2.2.6 of the existing ISO Tariff states that, among other things, Scheduling Coordinators are responsible for “[c]omplying with all ISO Protocols and ensuring compliance by each of the Market Participants which [they] represent[] . . .”³¹ This provision supports the fact that Scheduling Coordinators, as intermediaries for their clients, currently bear certain responsibilities in the verification of data they receive from market participants. Furthermore, the Commission has determined that Scheduling Coordinators such as APX should be held jointly and severally liable for refund liabilities associated with energy scheduled by the Scheduling Coordinator that cannot be apportioned to a specific entity.³² As such, we disagree with APX's proposed revision to EP 1.6 which would require the ISO to issue sanctions and penalties to market participants directly.

46. As explained herein, upon the Commission's acceptance of the CAISO's filing establishing an independent Governing Board in compliance with the Commission's orders in Docket No. EL01-35-000, et al.,³³ both the Commission and the DMA will undertake enforcement of the Enforcement Protocol. The language proposed in EP 1.9 merely reflects that fact. However, as the Commission held in the MBR Tariff Order, the Commission will not include a “make the market whole” component in such enforcement. Therefore, the Commission directs the ISO to revise EP 1.9 by removing the following language: “and additionally shall have the authority to impose penalties equal to the market impact of a violation under this Protocol.” Furthermore, until the Commission accepts the CAISO's filing establishing an independent Governing Board as discussed below,³⁴ in its compliance filing, the CAISO is directed to modify its proposal to indicate that the Enforcement Protocol will be enforced by the Commission. Thus, until the Commission determines that the CAISO is independent, the Commission will enforce all Rules of Conduct accepted herein.

³¹ See ISO Tariff Section 2.2.6.9.

³² San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services, 105 FERC ¶ 61,066 at P 159-172 (2003).

³³ See infra P 154.

³⁴ See id.

4. EP 2.2: Comply with Operating Orders

47. The General Rule proposed by the ISO under EP 2.2(a) requires market participants to “comply with operating orders issued by the ISO.” Failure to obey this instruction will result in a maximum fixed Standard Penalty of \$10,000 per event, allocation of any WECC penalty incurred by the ISO due to such event and a penalty based upon the market clearing price multiplied by the quantity of energy not provided or a Special Penalty of \$110,000 per event plus a variable penalty.³⁵ The CAISO proposes to except violations from penalties under this rule that are subject to the Uninstructed Deviation Penalty under Section 11.2.4.1.2 of the ISO Tariff, but only to the extent that the ISO has issued a separate and distinct non-automated Dispatch Instruction to the market participant. The CAISO also proposes to exempt the Special Penalties under this rule from the potential tripling of penalty amounts under EP 5.3. The CAISO claims that, at times, market participants refuse to comply with operation orders, which can cause significant operational difficulties. In support of its proposal, the ISO further states that its proposed provisions requiring compliance with CAISO operating orders are comparable to provisions adopted by ISO New England and the Northern Maine Independent System Administrator, Inc. In addition, the ISO states that the Commission approved a similar system of penalties and sanctions for the Midwest ISO to ensure compliance with operating orders and instructions.³⁶

Intervenors’ Comments

48. The Cogeneration Association of California (Cogeneration Association) argues that this rule should be approved only if the ISO implements software to adequately reflect a unit’s current capacity. Cogeneration Association states that such a requirement was imposed in Docket No. ER02-1656 when the CAISO proposed penalties for

³⁵ The CAISO proposes to assess Special Penalties under EP 2.2(c) as follows: (1) failure of a UDC to implement an order issued by the ISO to curtail load to manage a system emergency, pursuant to Sections 4.5.3 and 2.3.1.2.1 of the ISO Tariff, will be subject to a maximum penalty of \$110,000 per event and an amount equal to \$1,000 per MWh of firm load not curtailed; and (2) any failure to comply with an operating order that contributes to or prolongs an outage as described in Section 2.3.2.9.3 of the ISO Tariff will be subject to a maximum penalty of \$110,000 per event and allocation of any WECC Reliability Management System penalties incurred by the ISO due to such event, pursuant to Section 2.5.26.5 of the ISO Tariff.

³⁶ Citing Midwest Independent Transmission System Operator, 84 FERC ¶ 61,231 (Midwest ISO), order on motion for reconsideration and clarification, 85 FERC ¶ 61,250, order on reh’g, 85 FERC ¶ 61,372 (1998).

Uninstructed Deviations in its Comprehensive Market Redesign (MD02).³⁷ CDWR states that proposed Amendment No. 55 should be contingent upon the ISO's successful implementation of dispatch reforms in Amendment No. 54.³⁸

49. Duke Energy North America LLC and Duke Energy Trading and Marketing L.L.C. (collectively, Duke) assert that the CAISO has not demonstrated that market participants will submit bids or schedules for resources that are not available and capable of performing at the levels specified and, therefore, has not met its burden of demonstrating that monetary penalties for noncompliance with operating orders on this basis are just and reasonable. Duke requests that the Commission require the ISO to clarify that a market participant's resources will need to be available and capable of performing at the levels specified in the bid and/or schedule only at the time the market participant submits the bid and/or schedule. Duke also requests that the Commission require the ISO to clarify that this rule does not apply to the submission of schedules that the CAISO determines to be infeasible because of intra-zonal congestion. Duke argues that the CAISO's market design and software caused this problem and the Commission should not authorize the ISO to penalize suppliers for a market design that accepts infeasible schedules.³⁹

50. CDWR states that compliance with ISO emergency dispatch should entail forgiveness of resulting deviations. Therefore, CDWR argues that proposed EP 2.2 should be modified to add the following language:

Hold-Harmless for Compliance: In the event that a Market Participant's compliance with ISO operating orders causes deviations from schedules of directly or indirectly affected loads or resources of that Market Participant, that Market Participant shall not be liable for penalties and energy costs associated with such deviation caused by compliance with ISO operating orders.

51. Pacific Gas and Electric Company (PG&E) suggests that the proposed rules and penalties recognize the inherent uncertainty of large scale utility operations and scheduling and the impropriety of imposing penalties on load-serving entities. PG&E

³⁷ Citing California Independent System Corporation, et al., 100 FERC ¶ 61, 060 (2002).

³⁸ Id. at P 140-41.

³⁹ Citing California Independent System Operator Corp., 103 FERC ¶ 61,265, 61,980 (2003).

argues that utility companies should not be penalized for deviations caused by implementing ISO orders, including changes in load scheduling or dispatching of Reliability Must-Run (RMR) non-market energy.

52. Santa Clara argues that EP 2.2, taken in conjunction with the proposed change in ISO Tariff Section 2.3.1.2.1 defining final Hour-Ahead schedules as operating orders, would result in penalties that conflict with, or are duplicative of, the imbalance deviation band provisions of the Metered Subsystem (MSS) agreements. Santa Clara also argues that the proposed exception to EP 2.2, that would exempt certain violations that are subject to the Uninstructed Deviation Penalty under ISO Tariff Section 11.2.4.1.2, does not resolve the inconsistency for MSS entities. It contends that the conflicting provisions in ISO Tariff Section 11.2.4.1.2, as proposed by the ISO in its MD02 filing, and Section 13.12 of the MSS agreement regarding settlement of schedule deviations could be interpreted to penalize an MSS twice for the same imbalance. It argues that EP 2.2 should exempt MSS entities whose MSS agreements contain portfolio deviation bands and related penalty provisions because these penalties are duplicative for MSS entities.

CAISO's Answer

53. In its Answer, the ISO states that Cogeneration Association's request that the ISO's software be updated before EP 2.2 is implemented is unnecessary. The ISO states that it intends that market participants will be subject to penalty under EP 2.2 only for failure to comply with operating orders that are directly communicated to Scheduling Coordinators by means other than the ISO's automated dispatch system. The ISO states that, in order to provide clarification, it proposes to limit the applicability of EP 2.2 to operating orders that are communicated directly to the Scheduling Coordinator by the ISO, either verbally, electronically by means other than an automated dispatch instruction, or in writing.

54. The ISO also states that it does not intend that dispatch instructions will be subject to EP 2.2, unless a directly communicated and feasible operating order is ignored. The ISO states that, to the extent further clarification is necessary, the ISO is willing to modify ISO Tariff Section 2.3.1.2.1 to clarify that an operating order is not required to be complied with if it is physically impossible to perform, so long as the market participant immediately notifies the ISO of its inability to perform.

55. The ISO further states that it does not intend to penalize market participants for violations that arise due to compliance with an operating order instruction issued during an emergency. If a market participant demonstrates that it was acting in accordance with

an ISO operating order, then the ISO would excuse the violation pursuant to EP 5.2(b).

Commission's Determination

56. We find that the General Rule proposed by the ISO in EP 2.2(a) – comply with operating orders – is a fundamental market rule that should be adhered to by market participants and it represents the type of behavior-related tariff provision that the Commission will allow the MMUs to administer. Accordingly, we agree with the CAISO's directive in EP 2.2(a), including the change the CAISO states that it will make to allay Duke's concern (*i.e.*, that market participants not be penalized for the CAISO's flawed market design and software that accepts infeasible schedules). The ISO Tariff should be clear and comprehensive, eliminating any concerns regarding intent. Therefore, we direct the CAISO to modify ISO Tariff Section 2.3.1.2.1 and EP 2.2 accordingly. Moreover, market participants should notify the CAISO as soon as they become aware of a unit's inability to perform.

57. In addition, we are aware of the automation problems experienced in the CAISO markets. However, those problems should not interfere with the administration of EP 2.2(a) because the CAISO states that this market rule applies to operating orders that are directly communicated to Scheduling Coordinators by means other than the ISO's automated dispatch system.⁴⁰ With respect to Santa Clara's concern, the CAISO states in its Answer that, during the drafting process, the following provision was inadvertently removed: "This [Enforcement Protocol] does not modify the terms of any ISO agreements or the relationship of those agreements to the ISO Tariff." We require the ISO to include this provision in its compliance filing.

58. As discussed in Section C (2) (Proposed Penalty Structure) of this order, we find troublesome the penalties proposed for violations of EP 2.2. The CAISO has failed to define "event" and has failed to provide adequate specificity. To help guide the ISO in establishing appropriate penalty levels, we note that, in an order issued on September 16, 1998, the Commission approved the Midwest ISO's request of "substantial sanctions and penalties" of up to \$10,000 per day (and not per event) as well as the ability to withhold transmission revenues until the violation ceases and any outstanding penalties have been paid.⁴¹ The Commission believed that this penalty range was sufficient to ensure

⁴⁰ See CAISO Answer at 34.

⁴¹ Midwest ISO, 84 FERC at 62,161.

compliance with the Midwest ISO's orders and instructions.⁴² The Commission may also find acceptable, for example, a \$10,000 penalty for failure to provide energy in response to a dispatch instruction from the ISO to attain at least 90 percent of the resource's maximum economic limit using the generator's ramp rate.⁴³ In this example, the conduct and penalty are clear. Accordingly, we believe that a similar system of fines and penalties would be appropriate to ensure compliance with CAISO operating orders. Thus, we direct the CAISO to re-file the penalty provisions under EP 2.2, using the guidance provided in Section C (2) (Proposed Penalty Structure) of this order, to reflect a penalty range not to exceed \$10,000 per day for violations of EP 2.2.

5. EP 2.3: Submit Feasible Energy and Ancillary Service Bids and Schedules

59. The proposed General Rule under EP 2.3(a) requires market participants to bid and schedule energy and ancillary services from resources that are available and capable of performing at the levels specified in the bid and/or schedule. According to the CAISO, this proposed rule is desperately needed to mitigate operational difficulties due

to the submission of infeasible schedules.⁴⁴ Violations of this rule will be subject to a fixed maximum Standard Penalty of \$10,000 per event. If the conditions of proposed EP 5.3 are met, this penalty may be tripled. The CAISO proposes to except violations from penalties under this rule when an Uninstructed Deviation Penalty under Section 11.2.4.1.2 of the ISO Tariff has been assessed or when payments under Section 2.5.26 of the ISO Tariff have been eliminated.

⁴² Id.

⁴³ We note that a similar sanctionable event exists in the ISO New England Market Rules with an administrative penalty of \$1,000 per event or a formulaic penalty based on the MW deviation, the locational marginal price and the hours involved. ISO New England defines "event" as an hour or per day, depending on the circumstances.

⁴⁴ We note that the CAISO's use of the term "feasible" under this rule differs from the manner in which that term is used in the MD02 proposal. In the MD02 proposal, "feasible schedules" are based on an accurate model of all transmission constraints on the CAISO system. Here, "feasible schedules" refers to schedules that are operationally feasible based on a generating unit's specifications.

Intervenors' Comments

60. Duke argues that EP 2.3 is unnecessary because the ISO has failed to show that a significant problem exists or is likely to occur in the future that would warrant this provision. PacifiCorp argues that EP 2.3 should be modified to limit the feasibility of a bid or schedule to a market participant's own facilities or system. PacifiCorp argues that market participants should not be penalized for submitting a bid or schedule that, unbeknownst to the market participant, cannot be accommodated by the CAISO due to a line outage or similar grid issue and is labeled "infeasible."

61. PacifiCorp argues that the CAISO should include in EP 2.3 a "safe harbor" bandwidth, with levels developed through a coordinated working group process which would involve all interested stakeholders. PacifiCorp asserts that the Commission has approved the use of bandwidths for Uninstructed Deviations as part of the CAISO's MD02 market redesign.⁴⁵

62. CDWR is concerned that, with respect to the way EP 2.3 is worded, a commitment for Operating Reserves that is flagged as a "last resort" may be interpreted, in the context of an investigation, to mean that such resources will be continually dispatched throughout

the 24-hour period for which the bid was provided.⁴⁶ CDWR states that such an interpretation would, from its perspective, defeat the purpose of the contingency flag. CDWR states that this result would be fundamentally at odds with the long-established principle that operating reserves are to be held in reserve to meet unanticipated events and not used as a substitute for energy to manage the system. In addition, CDWR submits proposed tariff language to amend EP 2.3(a) to allow this market rule to be waived due to unforeseen or unpredictable events.

⁴⁵ Citing California Independent System Operator Corp., 100 FERC ¶ 61,060 at P 136, 150; ISO Tariff Section 23.12.1.

⁴⁶ CDWR states that the physical realities of CDWR's demand-based and hydro resources, whose primary purpose is water storage and delivery, flood control, water quality and in-stream flow compliance, recreation and other non-power grid obligations, are such that they may not be able to respond to ISO dispatch like gas-fired merchant generation.

63. Sempra argues that the ISO's General Rule under EP 2.3(a) appears to preclude certain bidding strategies that could assist the ISO in managing congestion and reducing costs for consumers. For example, Sempra believes that this rule may prevent a market participant from bidding into the ISO's Day-Ahead market prior to arranging a specific supply source and consumption sink. Sempra states that there is no reason to prevent a market participant from submitting adjustment bids as long as the market participant is prepared to assume the financial risk associated with arranging the source and sink after the market closes. Sempra further argues that the ISO should not adopt rules that prejudge the ability of market participants to perform under their tendered bids. Sempra contends that, to the contrary, the ISO should welcome market participants' efforts to find sources and sinks in locations that help alleviate congestion on the ISO grid.

CAISO's Answer

64. In response to Duke's claim that EP 2.3 is unnecessary, the ISO states that the integrity of ISO markets and the reliability of grid operations are dependent upon bids and schedules that reflect true operational characteristics and are, thus, feasible and reflect resources that are available and capable of performing at the levels specified in the bid and/or schedule. Moreover, the ISO states that the language provided in EP 2.3 is consistent with the language in the SMD NOPR requiring feasible bids and schedules and is also consistent with the principle enunciated by the Commission that market participants submit factually accurate information to system operators.

65. With respect to PacifiCorp's concern, the ISO states that it must deal with problems caused by bids and schedules submitted by market participants that are not feasible (e.g., inconsistent with the ramping and other operational information submitted by such market participants). The ISO also acknowledges, however, that bids and schedules may become infeasible due to malfunctions of the market participant's equipment and changing grid conditions (such as Intra-zonal congestion and line de-ratings) that cannot be reasonably predicted by the market participant. The ISO states that it does not intend for market participants to be held to a standard that would require them to predict grid operations or unforeseen events. Therefore, the ISO proposes to modify EP 2.3(a) as follows:

Market Participants must bid and schedule Energy and Ancillary Services from resources that are reasonably expected to be available and capable of performing at levels specified in the bid and/or schedule, and to remain available and capable of so performing based on all information that is known to the Market Participant or should have been known at the time of bidding or scheduling.

The ISO states that this modification will address the concerns of intervenors that they not be held responsible for events beyond their control.

66. With respect to PacifiCorp's request for a "safe harbor" bandwidth, the ISO states that such a stipulation is unnecessary because market participants should be responsible for submitting bids and schedules that contain an adequate allowance for the operational characteristics of their equipment.

67. In its Answer, the ISO states that CDWR's concern is adequately addressed by existing tariff language concerning Operating Reserves, and, therefore, no modification to EP 2.3 is necessary. The ISO states that a bid for contingency Operating Reserves obviously implies the expectation that it is feasible to provide the energy behind the Operating Reserve bid in the event of a contingency until other resources are obtained. The ISO states that there is nothing in the ISO Tariff that requires a resource to be capable of delivering energy output from Operating Reserve every hour for which an ancillary service is scheduled in a Day-Ahead Schedule (e.g., if a generating unit can deliver energy for 2 hours, it may still schedule Operating Reserves in all 24 hours). However, the ISO states that, if the ISO encounters a contingency and dispatches that capacity, thereby rendering the resource incapable of meeting the relevant standards specified in the ISO Tariff for subsequent hours, then the Scheduling Coordinator would be expected to buy back in the Hour-Ahead market those spinning reserves or non-spinning reserve schedules that could not be fulfilled. Therefore, the ISO concludes that there is no reason to read such an expectation into either the existing tariff language or EP 2.3(a).

68. Contrary to Sempra's argument, the ISO states that market participants should not be permitted to submit infeasible schedules merely because they believe that such schedules might be beneficial to the ISO. The ISO states that it is responsible for determining grid reliability and needs to be the party that determines which schedules are appropriate and necessary to manage congestion and address operational needs. The ISO states that it has experienced infeasible schedules since start-up and that such schedules have caused significant operational problems for the ISO.

Commission's Determination

69. We accept the CAISO's proposed General Rule in EP 2.3(a) requiring market participants to submit feasible bids and/or schedules, including the modification proposed by the CAISO in its Answer to ensure that market participants are not held responsible for events beyond their control or knowledge. We believe it is reasonable for the CAISO

to include in its tariff a requirement that the resource is physically capable of supplying the energy, ancillary service, or demand response needed to fulfill a schedule or bid according to the physical limitations of the resource.⁴⁷ We find that Sempra's concern (i.e., that EP 2.3(a) requires market participants to arrange a specific source and consumption sink before submitting a bid in order to avoid penalties) is misplaced. EP 2.3(a) states that resources should be "available and capable of performing at the levels specified in the bid and/or schedule."

70. In addition, we find that the ISO's proposal is not just and reasonable because it would have generators making allowances for operational characteristics that could later be called into question. We find that PacifiCorp's request for a safe harbor bandwidth is just and reasonable because it provides market transparency. Therefore, we direct the ISO to include a bandwidth.

71. While the proposed maximum fixed Standard Penalty provision for this particular rule appears reasonable (with the modification that the proposed maximum penalty be assessed per day rather than per event, as discussed above), consistent with our direction in Section C (2) (Proposed Penalty Structure) of this order, we require the ISO to specifically state the actual penalty to be imposed under this rule for each infraction, after considering the weighted effect of each factor approved under EP 5.1. In addition, the penalties under this Rule of Conduct must be in accord with the other modifications we have ordered to be made to EP 5 (Administration of Penalties).

6. EP 2.4: No Physical Withholding and EP 2.5: No Economic Withholding

72. The proposed General Rules under EP 2.4 and 2.5 prohibit market participants from engaging in physical or economic withholding of the output of a generating unit, in whole or in part.⁴⁸ Violations of these proposed rules are subject to a maximum fixed

⁴⁷ Our discussion here with regard to feasible schedules refers to the market design currently in effect.

⁴⁸ The ISO defines "physical withholding" as a failure to offer to sell or to schedule into the ISO market the output of or services of a generating unit capable of serving an ISO market, in a manner consistent with the ISO Tariff. The ISO defines "economic withholding" as (1) submitting a bid for a generating unit that is not consistent with the bid caps or thresholds specified in the ISO Tariff or any applicable agreement; or (2) submitting a bid for a generating unit that is unjustifiably high (relative to known operational characteristics and/or the known operating cost of the resource) and the generating unit is not or will not be dispatched or scheduled, or the bid (which is

Standard Penalty of \$25,000 per event and an amount equal to twice the Participant Benefits received by the offending party as a result of such behavior. If the conditions of proposed EP 5.3 are met, these penalties may be tripled. The CAISO proposes to except violations from penalties under these rules when such violations are the particular focus of another provision in the ISO Tariff specifically designed to address such behavior. As the ISO notes, since the ISO Tariff currently includes specific provisions addressing most, if not all forms of physical withholding (such as Appendix A to the MMIP), few penalties are likely to be assessed under proposed EP 2.4, as the ISO Tariff is currently comprised.⁴⁹ The ISO reaches this same conclusion with respect to the assessment of penalties for economic withholding under proposed EP 2.5.⁵⁰

Intervenors' Comments

73. Indicated Generators object to the CAISO's attempt to prohibit economic and physical withholding of generation. While the CAISO justifies this prohibition by stating that its rules are consistent with provisions in the New York ISO and ISO New England tariffs, Indicated Generators argue that the California market is different from the New York and New England models. Among other things, Indicated Generators contend that the CAISO's proposal ignores the fact that those markets and PJM include capacity markets in which generation owners may recoup some of their fixed costs in exchange for being required to hold their resources available. Indicated Generators emphasize that, in eastern markets, generators are paid for their unit commitment, while the CAISO proposal, by contrast, includes a must-offer requirement in real-time and no capacity market or other process through which generators may commit units for a price. Indicated Generators argue that the absence of any meaningful installed capacity payment (ICAP) feature has led to mistaken descriptions of rational economic behavior as "physical" and "economic withholding." In addition, Indicated Generators note that eastern markets establish thresholds for measuring these principles and only sanction market participants for displaying adverse behavior.

74. Some intervenors argue that the CAISO has not demonstrated the need for penalties and additional withholding prohibitions, especially in light of the Commission's adoption of a \$250/MW bid cap, Automated Mitigation Procedures (AMP) and

unjustifiably high) will set a Market Clearing Price.

⁴⁹ CAISO Filing Transmittal Letter at 34.

⁵⁰ Id. at 35.

decremental reference prices for mitigation of bids used to manage intra-zonal congestion in California⁵¹ and local market power mitigation in the form of RMR obligations.

75. Most intervenors argue that, under EP 2.4 and 2.5, the ISO fails to define pertinent terminology, such as “known” operating costs, “unjustifiably high,” and “unusual trades or transactions.” Indicated Generators argue the terms “violation,” “event” and “Participant Benefits” should also be adequately defined.

CAISO’s Answer

76. In its Answer, the CAISO asserts that both EP 2.4 and 2.5 provide for stronger penalties for withholding than are now available under the existing MMIP (*i.e.*, the disgorgement of profits). Therefore, the CAISO states that the more stringent provisions in these Enforcement Protocol Sections will serve as a more effective deterrent. The ISO also states that the penalties associated with EP 2.4 and 2.5 serve as a backstop in the event that the current tariff provisions change or an unanticipated form of physical withholding not explicitly addressed by ISO Tariff provisions materializes.

77. In response to the generators’ argument that EP 2.4 and 2.5 effectively create an on-going, unwarranted real-time must-offer requirement, the CAISO argues that, if a resource has available capacity in real-time, there is no legitimate reason why that resource owner should not offer its capacity in the ISO market, especially given that there is no other market into which the supplier could sell such energy. The CAISO asserts that, if the supplier is being compensated for its costs, it should be required to offer such energy into the real-time market. For this reason, the CAISO states that it supports an explicit permanent must-offer requirement as a fundamental condition of market-based rate authority.

Commission’s Determination

78. The CAISO seeks to impose sanctions for physical and economic withholding. We believe that these are redundant with measures the CAISO already has under its current market design. The CAISO has several tools at its discretion already; the CAISO has in place a must offer obligation, automatic market power mitigation, \$250 per MWh bid cap, and local market power mitigation in the form of RMR agreements. We believe that with these tools the CAISO has what it needs to address physical and economic withholding. Market rules concerning any must offer obligation and unit bidding should

⁵¹ Citing California Independent System Operator Corp., 100 FERC ¶ 61,060 at 61,245.

be clear and susceptible to compliance enforcement by the MMU without delving into subjective matters. The Commission in its MBR Tariff Order set forth the idea that an MMU's discretion is limited to what is objectively identifiable and provided for in the respective ISO or RTO tariff. The proposed provisions for physical and economic withholding are far too broad and not objectively identifiable, e.g., a unit that is "capable of serving the ISO market in a manner consistent with the ISO tariff" or a bid that is "unjustifiably high." Regardless, we believe that EP 2.4 and EP 2.5 are overly broad and overlap with the CAISO's current authorities under its existing market design. Finally, to the degree that physical and/or economic withholding occurs, we note that such behavior will be subject to investigation and enforcement by this Commission under the anti-manipulation provisions of Market Rule 2 of the MBR Tariff Order, as discussed below in Section C (10) of this order. Accordingly, we direct the CAISO to delete EP 2.4 and EP 2.5.

7. EP 2.6: Comply with Reporting Requirements

79. The CAISO states that one of the most common sources of operational difficulties it faces is the submission of inaccurate data regarding resource availability. For example, the CAISO states that, if a generating unit is shown to be available, either because an outage was not promptly reported to the ISO or due to a delay in updating the ISO's systems, then Dispatch Instructions may be needlessly sent to the generating unit. The proposed General Rule in EP 2.6(a) requires market participants to comply with all reporting requirements governing the availability and maintenance of a generating unit or transmission facility, including proper outage scheduling requirements. This rule also requires Scheduling Coordinators or Participating Transmission Owners (PTOs) to immediately notify the ISO when capacity changes or resource limitations occur that affect the availability of the unit or facility or the ability to comply with Dispatch Instructions. The CAISO acknowledges that the reporting problems it currently faces will be mitigated when the ISO implements Phase 1B of MD02, which includes an electronic interface for reporting outages. Violations of EP 2.6 are subject to a maximum fixed Standard Penalty of \$10,000 per event. If the conditions of proposed EP 5.3 are met, this penalty may be tripled. The CAISO excepts violations from penalties under this rule if an Uninstructed Deviation Penalty under Section 11.2.4.1.2 of the ISO Tariff has been assessed.

Intervenor's Comments

80. Duke argues that, in its experience, the ISO software and logging practices are usually to blame for inaccurate availability data. As such, Duke does not believe that proposed EP 2.6 is necessary; therefore, Duke argues that EP 2.6 is not just and reasonable. Duke further argues that the Commission should not allow the CAISO to impose monetary penalties until the ISO demonstrates that its proposed software changes

enable the ISO and generators to communicate real-time changes regarding generator conditions.

81. Southern California Edison Company comments that many resources cannot meet the availability reporting requirements of EP 2.6 because their availability is inherently unpredictable, perhaps due to intermittent resources such as wind and solar rays or the capability is affected by ambient conditions such as opacity limitations in coal output and temperature and humidity variations.

82. The City of Vernon, California (Vernon) argues that EP 2.6(a) places a legally impossible duty on minority project owners in joint transmission projects to report the availability and maintenance of a transmission facility and notify the ISO when the availability of the transmission facility is affected by capacity changes or resource limitations. Vernon explains that it does not have the legal authority to require operating agents to schedule outages with the ISO and obtain ISO approval. Vernon also states that this provision is inconsistent with the Transmission Control Agreements approved by the Commission and, as such, would circumvent the Commission's determination that the ISO is required to honor existing contracts.

CAISO's Answer

83. The CAISO responds to Duke's assertion that proposed EP 2.6 has not been shown to be necessary by arguing that the Duke cites to the wrong standard of review. The CAISO argues that the applicable standard is whether the provision is just and reasonable. In addition, the CAISO asserts that EP 2.6 is consistent with the market behavior rules proposed by the Commission in the SMD NOPR and in Docket No. EL01-118, as well as market rules that the Commission has approved for other independent system operators.

Commission's Determination

84. While we generally accept the notion of requiring all market participants to comply with the existing reporting requirements found in the ISO Tariff governing the availability and maintenance of a generating unit or transmission facility, it is unclear what is covered under the General Rule. Thus, we require the CAISO to clarify EP 2.6(a) (e.g., list the specific provisions of the ISO Tariff covered by this rule). In addition, we believe that Scheduling Coordinators and PTOs should make a good faith effort to immediately notify the CAISO when capacity changes or resource limitations occur which could hinder compliance with Dispatch Instructions. The CAISO states that Dispatch Instructions may be needlessly sent to an out-of-service generating unit if there is a delay in updating the ISO system. We require the DMA to monitor whether the

submission of needless Dispatch Instructions are the result of such delays to ensure that market participants are not inadvertently penalized for circumstances beyond their control. Consistent with our direction elsewhere in this order, the CAISO is directed to revise its penalty structure so that the meaning of “event” is clear (e.g., per day, per hour, per ten minute interval) and that the penalty amounts are reasonable. In addition, the CAISO should clarify the criteria it will use to determine whether it will assess an Uninstructed Deviation Penalty or the sanctions under EP 2.6. Finally, the ISO is directed to take into consideration the modifications ordered to be made to EP 5 (Administration of Penalties), as discussed above.

8. EP 2.7: Provide Factually Accurate Information

85. The proposed General Rule under EP 2.7(a) requires all applications, schedules, reports, and other communications by a market participant (or its agent) to be submitted by a “responsible company official” who is knowledgeable of the facts submitted. All such information submitted must be true, complete, and consistent with the operational plans of the company to the best knowledge of the person submitting the information. Violations of EP 2.7 are subject to a maximum fixed Standard Penalty of \$10,000 per event. If the conditions of proposed EP 5.3 are met, this penalty may be tripled. Violators of this rule will be assessed a Special Penalty if they: (1) submit load schedules that are substantially in excess of Metered Load served by a Scheduling Coordinator, which will be subject to a maximum penalty equal to the Net Excess Load multiplied by the applicable Market Clearing Price,⁵² (2) fail to provide complete and accurate Settlement Quality Meter Data that results in an error that is discovered after issuance of Final Settlement Statements, which will be subject to penalties described in Appendix A to the Enforcement Protocol, and (3) engage in Circular Scheduling, which is subject to rescission of the Usage Charge in accordance with Section 7.3.1.5.3 of the ISO Tariff and an additional maximum penalty equal to the value of the Usage Charge so rescinded.

Intervenors’ Comments

86. Certain intervenors argue that the ISO should be required to incorporate exceptions to accommodate changes that occur that are beyond the control of the market participant and to define exactly what constitutes a false communication. APX objects to the requirement that the Scheduling Coordinator “be knowledgeable of the facts submitted” and ensure that the information that its market participants submit to the CAISO “is true, complete and consistent with the operational plans of the company.”

⁵² The ISO defines Net Excess Load as the differential between Scheduled Load and Actual Load plus a reasonable tolerance band established by the ISO and updated from time to time.

APX argues that this section should be applied to the market participant directly, rather than its scheduling intermediary. APX contends that it does not have the means to ensure or verify the accuracy of the data or its consistency with the operational plans of the market participant or the time to accomplish these tasks.

87. Northern California Power Agency (NCPA) states that EP 2.7 should not be accepted until and unless the CAISO can assure the Commission that there are no circumstances in which the ISO will ask participants to act in a manner that will make the participants liable under this provision.

88. Vernon and PacifiCorp request that the Commission direct the ISO to define who qualifies as a “responsible company official.”

89. Sempra argues that the Special Penalties proposed by the ISO under EP 2.7(c) should be eliminated because layering on such additional penalties skews Scheduling Coordinators’ commercial decisions, adds inefficiency and will increase costs for consumers. For instance, with respect to the ISO’s proposed Special Penalty for submitting load schedules substantially in excess of Metered Load, Sempra states that it is unclear why this provision is needed, especially since the ISO proposes no symmetrical penalty for under-scheduled load. Sempra claims that, since the ISO balances load and supply based on its own forecast of grid loads, the ISO is indifferent to the level of load scheduled by Scheduling Coordinators and, for the most part, should welcome the fact that it has more adequate supplies to meet actual demand. Sempra also contends that it is possible to over-forecast loads by substantial amounts, especially under the conventional bilateral trading horizons which on weekends and holidays may require load forecasts that are three or four days in advance of the operating day. According to Sempra, because of the ISO’s balanced schedule requirement, the amount of load equal to bilateral take-or-pay purchases must be scheduled and, therefore, may greatly exceed the actual load on the operating day. Sempra argues that the provisions discussed herein should be eliminated because the ISO’s imbalance energy settlement already provides the appropriate incentive for accurate load schedules by Scheduling Coordinators.

CAISO’s Answer

90. In response to intervenors’ concern that the ISO should clarify what constitutes a false communication, the CAISO states that EP 2.7, as written, makes clear that the market participant is to submit data known to be accurate at the time of the submission and does not allow the ISO to penalize market participants prospectively for information that becomes inaccurate sometime in the future because of material changes in conditions not reasonably anticipated. With respect to Vernon’s concern, the ISO states that the phrase, “responsible company official who is knowledgeable of the facts submitted,” was

taken verbatim from the Commission's set of minimum behavioral rules recommended in the SMD NOPR. The ISO states that this provision reasonably implies that any information submitted to the ISO should be completed under proper management supervision to ensure the accuracy of the information. With regard to Sempra's concern, the CAISO states that it has encountered numerous instances where market participants have misreported meter data, including substantial amounts of underreported load. Therefore, the CAISO believes that the Special Penalties proposed under EP 2.7(c) are appropriate to remove any incentive to misreport meter data. The CAISO also notes that it is the market participant's responsibility under the ISO Tariff to submit accurate meter data.

Commission's Determination

91. We accept the General Rule found in EP 2.7(a). With respect to APX's concern, we direct APX and other Scheduling Coordinators acting as agents for their clients to develop a process by which the accuracy of information is verified. We agree that the term "responsible company official" is sufficiently broad to allow each market participant to select the appropriate management employee to assure the accuracy of submissions. With respect to NCPA and Sempra's concerns, we note that EP 2.7 requires information submitted to the ISO to be true, complete, and consistent with the operational plans of the company "to the best knowledge of the person submitting the information" at the time of submission. We believe this is a reasonable expectation. Further, we also believe that the proposed penalties in EP 2.7(b) and (c) in conjunction with the modifications required to be made to EP 5 (Administration of Penalties), discussed above, may be reasonable for applications, routine reports and other communications; however, we are unsure how "event" would apply to schedules. Therefore, we direct the ISO to clarify the meaning of "event" under this Rule of Conduct.

9. EP 2.8: Provide Information Required by the ISO Tariff

92. Under EP 2.8(a), the proposed General Rule requires that all information requested by the ISO, pursuant to the ISO Tariff, its protocols or jurisdictional contracts, be submitted in a complete, accurate and timely manner. The CAISO states that market participants must comply with the timelines specified in the ISO Tariff when submitting schedules and other information. Violations of this rule are subject to a maximum penalty of \$500 for each day that the required information is late. If the conditions of proposed EP 5.3 are met, this penalty may be tripled. The Special Penalties provision may escalate the penalty amount for violations of EP 2.8 to \$5,000 per day for repeat offenders. The CAISO states that these proposed provisions closely track those approved for other system operators.

Intervenors' Comments

93. Powerex Corp. (Powerex) asserts that EP 2.8 is excessively broad and lacks specificity. Powerex argues that the provision should indicate that the information requests must be reasonable. It claims that it would be inequitable to punish market participants for failures to respond due to unrealistic deadlines imposed by the ISO.

94. CMUA and PacifiCorp argue that the ISO does not specify the response time that will be provided to market participants for requests which are not currently specified in the ISO Tariff and, therefore, the potential exists for the ISO to demand that an unreasonably voluminous amount of information be produced in an unreasonably short period of time. PacifiCorp suggests that the "best efforts" standard that often governs discovery responses in Commission proceedings be used here. Alternatively, the Southern Cities⁵³ and Metropolitan recommend, at a minimum, a 30-day period for response to a request for information by the ISO.

CAISO's Answer

95. In its Answer, the CAISO states that, in response to intervenors' concern that EP 2.8 allows that CAISO to make unreasonable requests of market participants in terms of the volume of data requested and the time permitted to respond, it will add a new section to EP 2.8 in order to clarify that a market participant who objects to an information request under this section will have the right to challenge that request before the Commission. The proposed language is as follows:

(d) Challenge to FERC: A Market Participant who objects to a request made by the ISO under this section shall have the right to immediately appeal that request to the Commission for expedited review. For purposes of determining whether a Market Participant has made a timely response under this section, the ISO shall not count the period from the date on which a Market Participant files an appeal with the Commission until 15 days after that date.

Commission's Determination

96. We accept the General Rule found in 2.8(a), including the modification proposed above. The CAISO has not specified a particular time period to submit requested data

⁵³ Southern Cities includes the Cities of Anaheim, Azusa, Banning, Colton and Riverside, California.

pursuant to EP 2.8, and we will not do so here, as we find that the breadth of such information will differ for each case. However, we agree with the compromise language proposed by the CAISO in its Answer to be added as EP 2.8(d) which clarifies that a market participant who objects to an information request under this section may challenge that request before the Commission. We note that penalties should not be applied to requests that have been challenged. In addition, we accept the proposed penalties in EP 2.8(b) and (c), without modification.

10. EP 2.9: No Detrimental Practices and EP 2.10: No Market Manipulation

97. The proposed General Rule under EP 2.9(a) prohibits market participants from engaging in “detrimental practices,” which the CAISO defines as: (1) behavior that takes unfair advantage of the rules and procedures set forth in or pursuant to the ISO Tariff to the detriment of system reliability, other market participants, or the efficiency of the ISO market; and (2) such behavior or behavior substantially similar to it has been proscribed in a Final Market Notice [issued by the ISO] in accordance with the procedures outlined

in EP 4.6.⁵⁴ The maximum fixed Standard Penalty for violation of this rule is \$25,000 per event and an amount equal to twice the Participant Benefits received by the offending party as a result of such behavior.

98. The proposed General Rule under EP 2.10(a) states that market participants will not engage in market manipulation, which is behavior that meets the following requirements: (1) such behavior is fraudulent, deceptive, or manipulative and is intended to create artificial or distorted market prices or outcomes, including prices or outcomes that do not reflect or are not consistent with supply and demand conditions; and (2) such behavior or behavior substantially similar to it has been proscribed in a Final Market Notice [issued by the ISO] in accordance with the procedures outlined in EP 4.6. The Standard Penalty and Limitation for this rule is the same as those proposed for EP 2.9.

Intervenors’ Comments

99. Some intervenors argue that “catch-all” type language, found in EP 2.9 and EP 2.10, is subjective and should be excluded from the O&I Program proposal. For example, EP 2.9(a) states that “market participants should not engage in detrimental practices.” CMUA contends that a justifiable business practice may be “to the detriment

⁵⁴ The Limitation under EP 2.9(c) states that item (2) must be met before penalties are assessed.

of other market participants,” if “detriment” is interpreted as making an economically advantageous decision.

Commission’s Determination

100. We will accept the concept underlying the general prohibitions stated under EP 2.9(a) and 2.10(a), with the modification that the ISO remove the provision referencing behavior that was previously the subject of a Final Market Notice. However, in order to ensure clarity and uniformity with respect to the behavioral rules that the Commission will require market participants to follow, we will require the CAISO to replace the proposed language in EP 2.9(a) and 2.10(a) with Market Rule 2 of the MBR Tariff Order. In this way, market participants will be subject to consistent rules both in the ISO Tariff and their market-based rate authorizations which will be enforced by a single entity. In order to provide this consistency between the Enforcement Protocol, the

MMIP and the MBR Tariff Order, we also direct the CAISO to remove Sections 2.1.1 and 2.1.3 of the MMIP regarding gaming and anomalous market behavior⁵⁵ because they overlap with Market Rule 2 of the MBR Tariff Order. If physical and/or economic withholding occurs, such behavior will be captured under Market Rule 2 of the MBR Tariff Order.

101. As noted in the MBR Tariff Order, enforcement responsibility for EP 2.9 and EP 2.10 rests with the Commission. The types of behavior prohibited under these rules are not “objectively identifiable,” and, therefore, we will not allow the DMA to administer these behavior-related tariff provisions or assess penalties for violations of them. As such, we require the CAISO to replace the proposed penalty provisions under this rule (i.e., EP 2.9(b) and (c) and EP 2.10 (b) and (c)) with language that states that violations of these rules will be immediately referred by the DMA to the Commission. In addition, since the Commission has enforcement responsibilities for these Rules of Conduct, we will not accept EP 4 (Process for Prohibiting Detrimental Practices and Market Manipulation) which details the process the CAISO proposes to use to investigate alleged violations of EP 2.9 and EP 2.10.

⁵⁵ These sections of the existing MMIP are enforceable for the period predating their removal.

11. EP 3: Process for Investigation and Enforcement Generally

102. Under EP 3, the CAISO proposes the process by which it will formally investigate and enforce its proposed Rules of Conduct.⁵⁶ The CAISO states that it will adhere to the provisions contained in EP 3 before assessing any penalties for violations. The CAISO states that the process proposed in EP 3 will not apply to violations for which the CAISO has developed automated algorithms to detect such violations and to assess monetary consequences, provided that such violations are subject to review under the CAISO's current settlement and dispute resolution processes. In addition, the CAISO proposes that market participants may challenge the ISO's conclusions using the dispute resolution procedures outlined in Section 13 of the ISO Tariff.

Intervenors' Comments

103. Southern Cities assert that the procedures in EP 3 do not require the ISO to inform market participants of the information the ISO relied upon to initiate its investigation. Southern Cities request that the Commission require the ISO to amend this section to require the ISO to furnish all information relating to alleged misconduct, including all information upon which the ISO relies and relevant dispatch recordings, to the market participant under investigation. Southern Cities also argue that, in order to ensure that the ISO management thoroughly investigates conduct and reasonably interprets its rules before initiating a penalty proceeding, any market participant who may be assessed a penalty should have the opportunity to request a public hearing before the CAISO Governing Board before the penalty is levied.

104. APX argues that, if the CAISO initiates an investigation of a transaction, the ISO should inform not only the Scheduling Coordinator but also the market participant that is the subject of the investigation.

105. The Modesto Irrigation District objects to EP 3.1 which would allow the CAISO to deviate from the procedures set out in EP 3.

106. NCPA and CMUA contend that, in instances where the CAISO has developed automated algorithms to detect such violations and to assess monetary consequences, it appears that there will be no due process at all, since the disputes are then placed into the

⁵⁶ The process includes (1) Investigation, (2) Notice, (3) Opportunity to Present Evidence, (4) Results of Investigation, (5) Statement of Findings and Conclusions, (6) Referral to Oversight and Enforcement Agencies, (7) Notice to Officer Representative (if penalty, other sanction or referral is warranted), (8) Record of Investigation (if sanction or referral is warranted), (9) Review of Determination.

CAISO's current settlement and dispute resolution process.

107. Duke argues that, in order to provide certainty to market participants, the Commission should require the ISO to provide notice of an investigation to the market participant within 48 hours of the date the ISO discovers or reasonably should have discovered the alleged violation or within 60 days of the end of the month in which the violation occurred.

CAISO's Answer

108. The CAISO responds that, given the amount of scrutiny it expects its investigations will receive, the CAISO will have a strong incentive to sanction only behavior that has been fully investigated and determined to be clearly inappropriate based upon the facts presented to it.

Commission's Determination

109. As discussed above, in this order, the Commission allows the DMA to investigate, sanction and levy penalties for certain violations of the ISO's proposed Enforcement Protocol. In contrast, the procedures proposed by the CAISO in EP 3 envision the CAISO possessing such authority. Thus, EP 3 must be re-filed to reflect the reporting relationship adopted by the Commission in the MBR Tariff Order. With respect to intervenors' request that data collected in the early stages of the DMA's investigation be turned over to the market participant being investigated, we find that this approach would hinder investigations from reaching a timely conclusion. However, we will require the DMA to continue to include in EP 3 a process for market participants to respond to allegations against them before the DMA makes a decision. After a decision has been made by the DMA, the process proposed under EP 3 must allow for appeal to the Commission. We agree with APX's suggestion that, under EP 3, the DMA should be required to notify both the Scheduling Coordinator and the market participant it represents of alleged violations. APX and other Scheduling Coordinators acting as agents for their customers should immediately notify the alleged offenders they represent, in accordance with their revised internal processes which will be created as a result of this order. However, this dual notification will not automatically absolve Scheduling Coordinators from any wrongdoing; that conclusion will depend on the investigative findings.⁵⁷

⁵⁷ In addition, we will accept EP 6 (No Limitations on Other Rights of ISO) and

D. Proposed ISO Tariff Revisions to Address Additional Types of Prohibited Market Behavior

110. The CAISO proposes to implement the O&I Program not only through the Enforcement Protocol provisions discussed above, but also by (1) incorporating changes in the main body of the ISO Tariff to deter certain trading schemes identified in the “Enron Memos” and (2) revising the existing MMIP to complement the proposed Enforcement Protocol. These other two sets of proposed changes are discussed below.

1. Changes to Deter Certain Trading Schemes

111. The CAISO states that various trading schemes identified in the Enron Memos (and cited as prohibited behavior in the Show Cause Order) were used by market participants other than Enron. Thus, the CAISO proposes to amend provisions pertaining to bidding and scheduling in the ISO Tariff to address gaming behavior that is either explicitly or implicitly prohibited in the proposed Enforcement Protocol.

Intervenors’ Comments

112. Intervenors argue that the CAISO’s proposed structural changes to mitigate certain Enron trading strategies should be considered in the broader context of the MD02 market redesign proceedings.

CAISO’s Answer

113. The CAISO responds that MD02 does not address the types of behavior discussed in proposed Amendment No. 55. Additionally, the CAISO argues that it is appropriate and necessary to implement the Amendment No. 55 proposal separately from MD02 because the rules and sanctions contained in proposed Amendment No. 55 are designed to preempt certain categories of behavior before they escalate into market-wide problems.

Commission’s Determination

EP 7 (Amendments), which provide that nothing in the EP will hinder the ISO from collecting information from market participants, consistent with the existing provisions of the ISO Tariff, or instituting new provisions or amendments to the ISO Tariff, as needed.

114. We agree with the CAISO that market behavior rules should be implemented in California energy markets (and other organized markets) expeditiously to safeguard against unjust and unreasonable rates. Many of the Enron trading strategies took advantage of poorly constructed rules. We believe that clear, reasonable rules are the best method by which to prevent inappropriate “gaming” behavior. As such, we believe that the ISO Tariff can be improved to attempt to eliminate gaming opportunities. We also note that the anticompetitive trading strategies discussed below would be sanctionable under Market Behavior Rule 2 in the MBR Tariff Order, which prohibits, among other things, “transactions predicated on knowingly submitting false information to transmission providers or other entities responsible for operation of the transmission grid.”⁵⁸

2. Scheduling on Zero-Rated Transmission Paths

115. Under ISO Tariff Section 2.2.9 (Prohibition on Scheduling Across Out-of-Service Transmission Paths), the CAISO proposes to prevent Scheduling Coordinators from submitting schedules or adjustment bids across a transmission path for any settlement period for which the Operating Transfer Capability for that path is zero MW. This proposal includes open tie lines and ties that have physical capacity, yet schedules for flow in a particular direction are not permitted due to agreements with neighboring Control Areas or PTOs. The CAISO states that this prohibition is intended to deter traders from profiting from the trading strategy, “Wheel Out,” which was cited by the Commission as a prohibited gaming practice in the Show Cause Order. The CAISO states that the software currently used to run the Day-Ahead and Hour-Ahead Congestion Management program (CONG software) does not have a minimum Operating Transfer Capability at or below which it rejects schedules. Therefore, the CAISO claims that this software flaw creates an opportunity for a Scheduling Coordinator to manipulate the market by submitting a schedule across a transmission path known to be out-of-service and, potentially, receive counter-flow revenues by relieving this artificial congestion.⁵⁹ In addition, the CAISO contends that resources are squandered because its operations

⁵⁸ See MBR Tariff Order at P 64.

⁵⁹ The CAISO states that the CONG software seeks the result of a net-zero schedule across a tie-point. Therefore, if schedules are submitted in one direction across a de-rated or out-of-service tie, the CONG software will accept adjustment bids or counter-flows in the opposite direction and/or reduce the initial scheduled flows based on adjustment bids. CAISO Filing Transmittal Letter at 60.

staff must eliminate these physically impossible schedules before real-time.

116. To remedy this problem, the CAISO proposes to: (1) prohibit Scheduling Coordinators from submitting schedules on known zero-rated paths, (2) reject Day-Ahead schedules submitted on such paths, and (3) require Scheduling Coordinators, if time permits, to zero out any schedules on transmission paths in the Hour-Ahead market if the path ratings are reduced to zero after Final Day-Ahead schedules are issued. In addition, the CAISO proposes to reduce any non-zero Final Day-Ahead schedules across zero-rated transmission paths to zero after the close of the Hour-Ahead market to ensure that no Usage Charges will be assessed or any Usage Charges for counter-flow will be paid for schedules across a path with an Operating Transfer Capability of zero.⁶⁰ In addition to this change, the CAISO proposes to define the term “Operating Transfer Capability” to

mean “[t]he maximum capability of a transmission path to transmit real power, expressed in MW, at any given point in time.”⁶¹ The CAISO states that, as part of its MD02 proposal, it intends to modify the CONG software to reject schedules on tie-lines that are out-of-service at the time spot markets are run.

Intervenors’ Comments

117. Powerex claims that this prohibition is overly broad, fails to distinguish between improper and legitimate activity, and lacks the specificity to provide guidance to market participants. As such, Powerex suggests that the proposed prohibition be modified to permit the rejection of schedules by the ISO only across out-of-service lines. Powerex asserts that the provision fails to recognize the distinction between a zero rates tie (which could be subsequently re-rated and become available) and a tie that is physically open. According to Powerex, given the ISO’s congestion management responsibility, when a Scheduling Coordinator submits a schedule on an open tie, the schedule should be set to zero MW by the ISO congestion management system, and the ISO should publish a final schedule of zero MW for the Scheduling Coordinator. In addition, Powerex states that the CAISO should clarify how this provision will work with the balanced schedule requirement. Specifically, Powerex states that it is unclear whether the Scheduling Coordinator’s schedule will become unbalanced or whether the CAISO intends to force it to be in balance. Lastly, Powerex finds that the proposed provision could unfairly punish Scheduling Coordinators who have submitted a schedule on an open tie without prior

⁶⁰ CAISO Filing Transmittal Letter at 61.

⁶¹ See Appendix A to the ISO Tariff.

notice that the tie is open.

CAISO's Answer

118. In its Answer, the CAISO responds to Powerex's first argument, i.e., that the proposed prohibition should be modified to only reject schedules over out-of-service lines, by stating that Powerex's modification would defeat much of the intended purpose of this tariff revision. The CAISO states that the prohibition must also apply to ties that have physical capacity but for which schedules for flow in a particular direction are not permitted due to agreements with neighboring Control Areas or PTOs; otherwise, market participants would still be able to earn congestion revenues by scheduling counter-flow schedules on zero-rated paths, even though no congestion is actually relieved because energy would never be permitted to flow. In addition, the CAISO argues that Powerex is incorrect in its contention that, if a Scheduling Coordinator schedules on a tie that is physically open but rated zero due to contractual obligations, then that schedule should be set to zero by the ISO's Congestion management system and result in a final Hour-Ahead schedule of 0 MW on that path for that Scheduling Coordinator. The CAISO reiterates that the problem is that the ISO's congestion management system would set a Scheduling Coordinator's schedule on a particular path to zero by exercising an adjustment bid (accepting a counter-flow schedule), which is the precise behavior the proposed tariff provision is intended to prohibit. The CAISO states that it cannot merely set the schedule to zero because this action would result in an unbalanced schedule. Therefore, market participants must resubmit a balanced schedule when their schedules are rejected due to scheduling over zero-rated paths.

119. The CAISO responds to Powerex's second concern regarding how the proposed prohibition will operate in lieu of the balanced schedule requirement by stating that the ISO intends to implement this prohibition by making changes to its scheduling system to prevent Scheduling Coordinators from submitting schedules that include flows on any zero-rated path. The scheduling system would reject any such schedules when initially submitted and would notify the Scheduling Coordinator that submitted the schedule. The CAISO further states that, since schedules may be submitted seven days in advance, the scheduling system would also notify Scheduling Coordinators regarding schedules previously submitted on a path that becomes zero-rated and would direct the Scheduling Coordinator to resubmit a balanced schedule that does not contain the zero-rated path. Pursuant to the revision proposed herein, the CAISO states that, in the event the Scheduling Coordinator failed to resubmit a balanced schedule without the flow across the zero-rated path, the previously submitted schedule would not pass the validation processes conducted by the ISO prior to the close of the Day-Ahead and Hour-Ahead markets, and the ISO would request that the Scheduling Coordinator revise the schedule to remove the flow across the zero-rated path and balance the schedule. If the Operating

Transfer Capacity of a path was reduced after the close of the Hour-Ahead market, the ISO would implement its existing procedure of canceling all schedules on the path during the final real-time intertie checkout conducted prior to each operating hour, which would render these schedules unbalanced and subject them to any applicable Imbalance Energy charges.

120. The CAISO does not address Powerex's third concern: that the proposal could unfairly punish Scheduling Coordinators who submit schedules without prior notice that a tie is open.

Commission's Determination

121. We agree with intervenors that notifying market participants of derated lines and line outages is the responsibility of the System Operator. The CAISO acknowledges that, due to a software limitation, it is unable to meet its obligation to inform market participants of physically open ties. We note that the CAISO does not address Powerex's concern that market participants should receive prior notification of zero-rated paths, although the CAISO offers that schedules may be submitted up to seven days in advance, which implies a de facto notification process. However, we do not find this feature to be a reasonable accommodation for market participants or a prudent business practice. The CAISO states that: (1) it intends to make changes to its scheduling system to reject schedules on zero-rated paths and (2) this problem will be corrected upon implementation of its market redesign proposal. Therefore, we will accept the ISO's prohibition against intentionally scheduling over zero-rated paths, as proposed in ISO Tariff Section 2.2.9, effective on the date of implementation of the changes the ISO commits to make to its scheduling system.

3. Elimination of Usage Payments for Undelivered Counter-Flow Schedules

122. Under the CAISO's existing scheduling and settlement procedures, Scheduling Coordinators who submit counter-flow schedules in the Day-Ahead and/or Hour-Ahead markets may receive congestion revenues even if these Scheduling Coordinators cut or reduce their schedules in real-time.⁶² The CAISO states that its payment for congestion

⁶² In addition, the existing ISO Tariff Section 7.3.1.5.2 state that "[i]f a Scheduling Coordinator fails to provide the scheduled flows in a counter direction, it must reimburse the ISO for the ISO's costs of buying or selling Imbalance Energy in each of the Zones affected by the non-provided scheduled flows in a counter direction, at the ISO's Zonal Imbalance Energy prices. That is, for any Scheduling Coordinator that does not produce, in real time, the amount of Energy scheduled in the Day-Ahead Market or Hour-Ahead

relief due to scheduled counter-flows creates a potential gaming opportunity for Scheduling Coordinators to sell congestion relief in the forward markets and then cut the counter-flow schedule after the close of the Hour-Ahead market.⁶³ The CAISO further states that, although most counter-flow schedules are not the product of gaming but are due to circumstances that are unforeseeable and beyond the Scheduling Coordinator's control, a financial inequity is created each time a counter-flow schedule is cut or reduced because congestion payments are made for schedules that are not delivered in real-time. The CAISO states that this problem is the result of a market design flaw and is perpetuated by the inability of System Resources to set market clearing prices. The ISO

further states that, although differential prices are calculated today in the forward congestion management markets, a single Imbalance Energy price applies in real-time; however, the ISO states that this design flaw is corrected in the MD02 proposal because System Resources (imports) are proposed to be eligible to set market clearing prices.

123. Until MD02 is accepted and implemented, the CAISO proposes to amend ISO Tariff Section 7.3.1.5.2 (Changes Concerning Cut Counter-Flow Schedules) to state that "Usage Charge payment will be eliminated, pro rata, based on the difference between the scheduled counter-flow in the Hour-Ahead Market, and the final real-time Schedule in the counter direction" for flows not delivered in real-time.⁶⁴ The CAISO states that this provision will not apply to schedules across Paths 15 and 26.

124. The CAISO believes that this amendment will eliminate any incentive for

Market will be deemed to have purchased/sold the amount of Energy under/over produced in the real-time imbalance market at the real time price."

⁶³ CAISO Filing Transmittal Letter at 65.

⁶⁴ The proposed amendment to Section 7.3.1.5.2, in its entirety, states that "to the extent that any Scheduling Coordinator would receive a Usage Charge payment for Energy that was scheduled in a counter direction over an inter-tie in the Day-Ahead or Hour-Ahead Market but was not delivered in real time, that Usage Charge payment will be eliminated, pro rata, based on the difference between the scheduled counter-flow in the Hour-Ahead Market, and the final real-time Schedule in the counter direction. For purposes of any adjustments to Usage Charges under this provision, scheduled flows in the counter direction and any related Usage Charges shall be determined relative to the direction of the final Hour-Ahead flow on the inter-tie. If Congestion reverses direction in the Hour-Ahead relative to Day-Ahead, the Day-Ahead Usage Charge deemed to have been paid to the Scheduling Coordinator in the counter direction is \$0/MWh (not the negative of the Day-Ahead Usage Charge)."

Scheduling Coordinators to cut counter-flow schedules intentionally.⁶⁵ The CAISO further proffers that the change proposed herein is more analogous to the elimination of payment for services not provided than a penalty. As such, the CAISO acknowledges that the proposed revision may not be a sufficient deterrent and states that the ISO may elect to initiate an investigation into gaming, pursuant to proposed EP 2.3, if such practices are found to be systemic and part of a gaming strategy.

⁶⁵ As discussed in the prior section, the gaming strategy, “Wheel Out,” involved Scheduling Coordinators who intentionally scheduled on zero-rated paths to create artificial congestion and, then, submitted adjustment bids (counter-flow schedules) to relieve this congestion and collect congestion revenues.

Intervenors' Comments

125. Sempra argues that the CAISO's proposal to "cut counter-flow schedules" and eliminate the payment of congestion revenues to Scheduling Coordinators whose counter-flow schedules are cut after the close of the Hour-Ahead market will interfere with legitimate commercial practices, reduce the efficiency of the ISO's Day-Ahead and Hour-Ahead markets, and offer no reliability benefits. Sempra contends that counter-flow schedules increase the number of flows on the grid in the direction of congestion and can also be used to offset the inefficiencies introduced by the ISO's current method for dealing with unconverted transmission rights that are not used by the rights' holders (principally, municipalities and government entities). In addition, Sempra provides a numerical representation of how counter-flow schedules reduce costs for consumers, even if these schedules are cut after the close of the Hour-Ahead market.

126. Competitive Suppliers⁶⁶ and Powerex contend that this market design change, i.e., the elimination of congestion payments for forward counter-flow schedules when these schedules are cut prior to real-time, should be considered in the context of the MD02 proceeding.

CAISO's Answer

127. In response to the argument that this proposal is a market design issue which would be better addressed in the MD02 proceeding, the CAISO states that the proposed amendment to ISO Tariff Section 7.3.1.5.2 is necessary due to a market design flaw that encourages counter-flow schedules to be cut prior to real-time. The CAISO responds to Sempra's assertion that this proposal would interfere with legitimate business practices by stating that it is unclear how "cut counter-flow schedules" represents a legitimate business practice. The CAISO argues that undelivered counter-flows cause the scheduled flow across a constrained path to be increased over what would have been scheduled in the absence of that scheduled counter-flow, thereby increasing the risk of real-time congestion. With respect to Sempra's claim that counter-flow schedules can increase the ability of other participants to engage in commercial transactions in the direction of congestion, the CAISO states that phony counter-flow schedules are not the appropriate mechanism for addressing "phantom" congestion associated with existing contract rights.

Commission's Determination

⁶⁶ The Competitive Suppliers include the Independent Energy Producers Association, the Electric Power Supply Association and the Western Power Trading Forum.

128. Presently, the CAISO charges Scheduling Coordinators who submit counter-flow schedules that never materialize in real-time the ISO's cost of buying or selling Imbalance Energy in each of the zones affected by the non-provided scheduled flows in a counter direction at the ISO's Zonal Imbalance Energy prices. In addition to charging Scheduling Coordinators the cost of procuring Imbalance Energy, in this filing, the ISO proposes to rescind congestion revenue payments to Scheduling Coordinators as a result of these schedules. We understand the ISO's need to mitigate the potential financial inequity in forward markets in instances where the cost of congestion exceeds congestion revenues; however, if a Scheduling Coordinator submits a counter-flow schedule that effectively relieves congestion and, thereby, reduces costs to consumers, the Scheduling Coordinator should be paid for doing so, consistent with the ISO's existing congestion management system. If this schedule is cut in real-time, the ISO Tariff already requires the Scheduling Coordinator to pay the ISO's cost of procuring Imbalance Energy as a result of this non-delivered schedule.

129. We believe the existing tariff provision in Section 7.3.1.5.2 of the ISO Tariff provides an appropriate mechanism to ensure that the ISO is not adversely impacted financially from counter-flow schedules that are cut in real-time. In addition, the ISO has not demonstrated that, absent the proposed amendment, it will incur financial harm. Moreover, we disagree with holding Scheduling Coordinators responsible for circumstances "unforeseeable and beyond the Scheduling Coordinator's control," given the ISO's acknowledgement that most counter-flows are not the product of gaming. We recognize that a balance between providing disincentives for anticompetitive behavior and providing regulatory certainty in the marketplace must be maintained. Accordingly, we will not accept the proposed amendment to Section 7.3.1.5.2 to the ISO Tariff that eliminates payment of Usage Charges for counter-flow schedules.

4. Buy-Back of Ancillary Services in the Hour-Ahead Market

130. The CAISO proposes to amend various tariff sheets⁶⁷ to set the price of ancillary services (i.e., regulation, spinning reserve, non-spinning reserve and replacement reserve) sold in the Day-Ahead market and bought back by participants in the Hour-Ahead market to the greater of the Day-Ahead market clearing price or the Hour-Ahead market clearing price for the relevant ancillary service. The CAISO asserts that this change is the only

⁶⁷ ISO Tariff Section 2.5.21 (Scheduling of Units to Provide Ancillary Services); SP 9.1 (Bid Evaluation and Scheduling Principles); SP 9.3 (Scheduling Ancillary Services Resources); ISO Tariff Section 2.3.1.2.1 (Comply with Operating Orders Issued) under Changes Concerning Schedules and Bids Being Binding Obligations; and SBP 5.3 (Buy Back of Ancillary Services).

reliable manner to deter the Enron trading strategies known as “Get Shorty” and “Paper Trading.” According to the CAISO, in the absence of this modification, the ability to detect this type of market manipulation will continue to be extremely limited and administratively burdensome. The CAISO claims that this difficulty stems from the fact that virtually all Day-Ahead ancillary services commitments that are cancelled prior to the Hour-Ahead market are imports to the ISO system by marketers, rather than utilities or generators directly operating physical resources. Additionally, the ISO states that the actual availability of Day-Ahead ancillary services commitments that are reduced or cancelled in the Hour-Ahead market cannot be verified after-the-fact because, for imports of ancillary services, suppliers are only required to identify the Control Area instead of the actual physical resources backing these commitments.

131. The CAISO further contends that the Commission’s conclusion in the MMIP Order⁶⁸ was based on a faulty premise: that the ISO’s spot markets for ancillary services are simply financial markets for a single “fungible commodity,” rather than separate markets for two distinct physical products. According to the CAISO, ancillary services are essential physical commitments needed to meet the demand for system reliability, rather than financial positions for a commodity. As such, the ISO argues that ancillary services bought in the Day-Ahead Market are not readily interchangeable with those purchased in the Hour-Ahead Market. Accordingly, the CAISO also proposes to prevent market participants with physical resources from profiting from arbitrage in contravention of the Commission’s ruling in the MMIP Order.

Intervenors’ Comments

132. Duke and Indicated Generators argue that the Commission has previously stated that “taking advantage of the systemic differences in the Day-Ahead and Hour-Ahead market prices for ancillary services by selling ancillary services in the Day-Ahead market and buying them back at a lower price in the Hour-Ahead market” is legitimate arbitrage. While the CAISO claims that the Commission erred in this determination, these intervenors argue that no showing has been made by the CAISO to demonstrate that the buy back of available ancillary services either harms consumers or causes operational problems.

133. Powerex contends that proposed Tariff Section 2.3.1.2.1 has the effect of eliminating market mechanisms which enable the ISO to procure as much energy as possible ahead of real-time and may cause importers to be more conservative in the

⁶⁸ See American Electric Power Service Corporation, et al., 103 FERC ¶ 61,345 (2003).

amount of energy they offer. Powerex argues that the provision makes any Hour-Ahead ancillary services schedule or Supplemental Energy bid a binding obligation and, therefore, that a resource so scheduled or bid cannot be made unavailable or otherwise non-responsive to ISO operating orders except in conditions beyond the control of the resource owner. Powerex argues that the same is true for any Day-Ahead commitment of a resource, whether self-scheduled or committed in the Day-Ahead Market. Powerex also argues that this provision fails to describe the mechanism that Scheduling Coordinators will use to demonstrate that non-compliance of an operating order was due to an uncontrollable event. Lastly, Powerex requests that the Commission reject this provision unless the CAISO explains why the Day-Ahead commitment of resources will be considered “binding” when there is no unit commitment market.

CAISO’s Answer

134. In its Answer, the CAISO states that existing settlement provisions that permit Day-Ahead ancillary services commitments to be cancelled on an Hour-Ahead basis have been abused in a way that negatively impacts system reliability. The CAISO also claims that, due to varying lead times and scheduling requirements, the bulk of its ancillary services requirements must be procured on a Day-Ahead basis in order to ensure that sufficient supply of such unloaded capacity is available. Thus, the CAISO contends that the capacity procured in each spot market is a distinct physical product, offering different degrees of system reliability. The CAISO contends that the uncertainty in the Hour-Ahead Market regarding the available supply of reserve capacity on an Hour-Ahead basis, even if the prices in the Hour-Ahead market may be systemically lower than Day-Ahead prices, precludes the ISO from deferring a portion of its purchases to the Hour-Ahead Market.

Commission’s Determination

135. We agree in part with the CAISO. As discussed in greater detail in the Western Markets Report,⁶⁹ the Staff concluded that “paper trading” was a by-product of the CAISO’s fatally flawed market design. In the end, the Staff concluded that the submission of false schedules, and not the legitimate arbitrage of ancillary services, enabled some market participants to game the system. Companies could commit to sell on a Day-Ahead basis without having capacity available and fulfill their obligation by buying ancillary services from the ISO in the Hour-Ahead market, which compromised system reliability. To the extent that this trading strategy involves deliberately supplying

⁶⁹ Final Report on Price Manipulation in Western Markets (Docket No. PA02-2-000) (2003) (Western Markets Report). The Western Markets Report is available on the Commission’s website.

false information, we strictly prohibit its use, consistent with Market Rule 2(b) in the MBR Tariff Order.⁷⁰ By requiring the CAISO to include Market Rule 2 of the MBR Tariff Order in the ISO Tariff, we address this issue in a manner that provides consistency and clarity for sellers that sell pursuant to market-based rates and operate in the CAISO market. The DMA should report this type of gaming behavior to the Commission for investigation and enforcement.

136. We understand the ISO's need for added assurance that commitments settled in the spot markets will be available when called upon. Nevertheless, we disagree with the CAISO's argument that suggests, for example, that spinning reserves purchased Day-Ahead are somehow different from spinning reserves purchased Hour-Ahead. Therefore, we will not accept proposed provisions which preclude market participants, with sufficient capacity resources, to improve their financial positions. Requiring that these sellers buy back their position at a price that is the greater of the Day-Ahead market clearing price or the Hour-Ahead market clearing price will ultimately increase the "opportunity cost" of selling ancillary services in the Day-Ahead market and will likely lead to higher Day-Ahead prices for ancillary services. While we agree that ancillary services are physical commitments to meet the demand of system reliability, we find no correlation that suggests (and the CAISO makes no showing) that legitimate arbitrage inhibits the reliability of the grid. On the contrary, legitimate arbitrage attracts suppliers and enhances market liquidity. Accordingly, we will not accept the CAISO's proposed tariff language to the sections referenced above. In addition, we note that the CAISO also has the option of requiring imports to specify a physical resource when submitting bids.

5. Prohibition on Circular Schedules

137. "Circular Scheduling" or "Death Star" is a trading strategy known to be used by Enron for gaming purposes. Circular Schedules are offsetting schedules on tie-points between Control Areas (or Zones), which appear as an import and export through the ISO

Control Area but create a closed loop flow of energy with no specific source or sink.⁷¹

⁷⁰ MBR Tariff Order at P 64-69.

⁷¹ The CAISO states that one schedule may be a "wheel through" whereby a Scheduling Coordinator schedules power into the ISO at one point and then out of the ISO at another point. According to the ISO, the second schedule is made between the same two locations in the counter direction and is scheduled outside of the ISO Control Area (or back through the ISO Control Area through another Scheduling Coordinator

The purpose of this tactic is to collect congestion revenues from the creation of counter-flows. The CAISO claims that this type of market manipulation can adversely affect system reliability. Accordingly, the CAISO proposes to explicitly prohibit the use of Circular Schedules⁷² and adds a new definition of Circular Schedules to the ISO Tariff.⁷³ The CAISO states that it may periodically provide examples of such Circular Schedules under the ISO Home Page. Pursuant to proposed EP 2.7 (Provide Factually Accurate Information), the CAISO explicitly states that “engaging in a Circular Schedule is subject to the rescission of the Usage Charge in accordance with Section 7.3.1.5.3 of the ISO Tariff and an additional maximum penalty equal to the value of the Usage Charge so rescinded.”

Intervenors’ Comments

138. Powerex requests the CAISO confirm that only transactions that meet its precise definition are Circular Schedules. Powerex argues that it is imperative that, before sanctions are applied, Scheduling Coordinators should know in advance which schedules are prohibited. Powerex also requests that the ISO be required to confirm that it will not find that a Circular Schedule exists by combining a Day-Ahead schedule with an Hour-

with Existing Transmission Rights.) The ISO states that the second schedule effectively cancels out the first and that energy is allowed to flow in the same direction of congestion. It states that the second Scheduling Coordinator pays no congestion charges, yet, the CAISO must make a congestion payment to the first Scheduling Coordinator for relieving congestion, even though the flows of the first schedule are offset by the second schedule.

⁷² The CAISO proposes to revise Second Revised Sheet No. 307 (Supersedes First Revised Sheet No. 307) to FERC Electric Tariff, First Replacement Volume No. 1.

⁷³ The CAISO proposes to define Circular Schedules as follows: “A Schedule or set of Schedules between the ISO Controlled Grid and one or more other Control Areas that do not have a source and sink in separate Control Areas, which includes Energy scheduled in a counter direction over a Congested Inter-Zonal Interface through two or more Scheduling Points. A closed loop of Energy Schedules that includes a transmission segment on the Pacific DC Intertie shall not be a Circular Schedule because such a Schedule directly changes power flows on the network and can mitigate Congestion between SP15 and NP15.” Master Definitions Supplement of the ISO Tariff.

Ahead schedule. Powerex asserts that Scheduling Coordinators should not be penalized for non-compliance due to unintentional scheduling errors or other administrative errors.

139. FPL Energy, LLC (FPL Energy) claims that the ISO's definition of prohibited Circular Schedules imposes an overly myopic view of the Western Interconnection and will prevent legitimate business transactions (e.g., market participants seeking liquid trading hubs outside of the CAISO Control Area (such as Palo Verde and Mead) who choose to wheel-through the ISO Controlled Grid because it is a logical and effective path). FPL Energy requests that the Commission require the CAISO to justify this broader definition of Circular Schedules and to provide examples of prohibited Circular Schedules.

140. APX supports the proposed change that prohibits Circular Schedules; however, it argues that the proposed definition may result in unwarranted enforcement proceedings. APX suggests that the CAISO clarify that the definition does not include instances in which the Scheduling Coordinator for multiple buyers and sellers for any one interval submits schedules that have the appearance of a Circular Schedule because the schedule is a combination of a number of different market participants' separate, but simultaneously submitted, schedules.

CAISO's Answer

141. The CAISO responds that the argument that a prohibition on Circular Schedules would prohibit legitimate business behavior is antithetical to the Commission's finding in the Show Cause Order: that this practice violated the MMIP because it involves the submission of false schedules to the ISO and also because participants "fraudulently received congestion relief payments for energy that was never provided and did not relieve congestion."⁷⁴ Additionally, the CAISO agrees with APX that Circular Scheduling should not result in a penalty to the Scheduling Coordinator, pursuant to the example that APX provides. The CAISO reminds APX that, if accusations of Circular Scheduling are put forth, the Scheduling Coordinator would be afforded due process during the investigation.

Commission's Determination

142. We accept the CAISO's proposed prohibition of Circular Scheduling. We find that Circular Scheduling is an anticompetitive practice which results in distorted market prices and congestion payments that would not have been tendered in the absence of these schedules. This type of market manipulation is captured under Market Behavior

⁷⁴ CAISO Answer at 78 (quoting Show Cause Order at P 46).

Rule 2(c) in the MBR Tariff Order addressing transactions in which an entity knowingly creates artificial congestion and then purports to relieve such artificial congestion; therefore, this prohibition will be enforced by the Commission. We will not allow the CAISO to update the definition of “Circular Schedules” at its discretion. Any proposed revision should be filed with the Commission. Finally, as discussed earlier in this order, we do not accept the Special Penalty proposed in EP 2.7 (Provide Factually Accurate Information) that the ISO states it intends to impose on market participants who engage in Circular Scheduling. Due to the CAISO’s inability to track schedules of imports, among other things, this behavior cannot be categorized as “objectively identifiable.”

E. Proposed Changes to the Existing MMIP

143. The CAISO proposes to revise the existing MMIP to include a number of housekeeping changes (e.g., the removal of references to the California Power Exchange and the “pre-divestiture” period and the replacement of the term “Activity Rules” with “Rules of Conduct”) and to be consistent with certain provisions contained in the proposed Enforcement Protocol. In addition, the CAISO states that the MSU has been renamed the DMA and proposes certain modifications to the structure and responsibilities of the DMA. The CAISO also proposes several modifications that affect the authority and responsibilities of the MSC,⁷⁵ among other things.

144. Currently, the DMA is staffed by ISO employees and managed by a Compliance Director who reports to the ISO General Counsel. Under the existing MMIP, the DMA monitors, investigates and analyzes the day-to-day activities of market participants and the ISO and such activities that affect market operations. The DMA reports bad behavior and makes recommendations to the ISO CEO or the MSC for further action or, where necessary, to other entities. (DMA reports must be submitted to the MSC before they are distributed to any other entity.) The ISO CEO, in turn, publicizes such activities or behavior in whichever manner deemed appropriate. The ISO Governing Board determines, based on reports received from the ISO CEO, whether sanctions and penalties are warranted, as permitted under the ISO Tariff, or refers market abusers to the Commission or other regulatory agencies for appropriate action.

145. In proposed Amendment No. 55, the CAISO retains the above organizational structure with certain modifications. The CAISO proposes that both the ISO CEO and

⁷⁵ The MSC is an independent entity comprised of three members that are not employees or agents of the ISO. It provides independent external expertise on the ISO market monitoring process and makes recommendations to the ISO Chief Executive Officer (CEO) and the ISO Governing Board.

the MSC have independent authority to refer matters to the ISO Governing Board for approval of recommended actions based on reports received from the DMA. However, under proposed MMIP Section 2.1.5, the ISO states that the DMA may only provide the MSC with information it collects pertaining to market structure flaws if instructed to do so by the ISO CEO or ISO Governing Board. Under proposed MMIP Section 4.4.1, the ISO excludes the MSC from receiving periodic reports prepared by the DMA. In addition, the ISO proposes that the DMA will no longer be required to funnel all reports through the MSC before distributing these reports to other entities. The ISO also proposes to provide the MSC the authority to recommend sanctions and penalties and ISO Tariff changes. Pursuant to proposed MMIP Section 7.13, the ISO CEO, upon the recommendation of the MSC, may impose sanctions or penalties as it believes necessary and as are permitted under the ISO Tariff and related protocols approved by the Commission, or it may make any such referrals to any regulatory or antitrust agency for remedial action. Finally, under proposed MMIP Section 2.3.1, the CAISO broadens the scope of its market monitoring to include “markets interconnected or interdependent on ISO markets.” The ISO proposes that the DMA will refer violations from this set of ISO participants to the appropriate regulatory agency.

Intervenors’ Comments

146. Metropolitan protests that, under the ISO’s proposal, the market monitor is not independent of the ISO, especially given the lack of independence of the ISO Governing Board. Metropolitan argues that the ISO has not adequately explained why it intends to withhold information from the MSC pursuant to revisions under proposed MMIP Sections 2.1.5 and 4.4.1.

147. CMUA further argues that the O&I Program limits independent scrutiny of the ISO markets and the ISO’s performance because, unlike in the existing MMIP, under the new proposal, the DMA will report market flaws to the ISO CEO and ISO Governing Board first, and, only if instructed to do so, the DMA will share this information with the market monitor, *i.e.*, the MSC. CMUA argues that a just rationale has not been provided for this significant change in reporting responsibility.

148. Sacramento Municipal Utility District argues that, unlike other monitoring mechanisms, the DMA will be established as part of the CAISO in contravention to prior Commission orders.⁷⁶ It protests that, under proposed MMIP Section 3.2 and 3.3.1, the DMA will be staffed by ISO Staff, under the management of the ISO CEO or General Counsel and accountable only to the ISO CEO or designee. It also protests that, under proposed MMIP Section 4.4.2, the DMA will have no teeth: it will merely make reports

⁷⁶ Citing Mirant, 100 FERC ¶ 61,059.

and recommendations to the CAISO, who may, at its discretion, alert the Commission and other regulatory bodies of various concerns.

149. Sempra also objects to extending the reach of the DMA to other entities whose activities may affect the operation of the ISO markets.

150. Competitive Suppliers and Sempra argue that penalties should not apply to CAISO market participants who choose not to respond to an ISO information request regarding participation in non-CAISO markets. They state that only jurisdictional wholesale sellers need to provide such information. Sempra argues that, similar to PJM and the New York ISO, penalties should only be assessed after application to the Commission which allows the respondent the opportunity to challenge the penalty on the merits. Competitive Suppliers argue that penalties should only be assessed by the Commission.

151. Metropolitan asserts that MMIP 8.2, which provides that the ISO shall publish market clearing prices for energy and ancillary services, aggregate supply and demand for each zone, congestion and congestion costs, generation unit and transmission line outages, and hydroelectric generation for market participants, should not be deleted because this information is of great benefit to market participants. TANC argues that the proposal's elimination of Section 8.2 of the MMIP will hinder market transparency by eliminating the required publication of important market information. It contends that it is unclear whether this information would be included in the indices referenced in MMIP 4.1.3, which provides for the development of a catalog of ISO market monitoring indices that the ISO will use to evaluate the data it collects.

CAISO's Answer

152. In its Answer, the CAISO states that it does not agree with the proposed requirement in the SMD NOPR that an Independent Transmission Provider's market monitoring units should be independent of its management. The ISO states that the DMA has been at the forefront of the investigations of market conditions in California since the ISO began operations nearly five years ago, and, throughout this period, the DMA has reported to ISO management. In addition, the ISO argues that reconstituting its market monitoring and enforcement unit in a completely different form could harm its efficiency and effectiveness.

153. In response to Sempra, the CAISO states that the existing provisions of the MMIP allow the ISO to request ISO participants and "other entities whose activities may affect the operation of the ISO markets" to submit "any information or data determined [by the ISO] to be potentially relevant" to an investigation. The ISO argues that the changes proposed to the MMIP in Amendment No. 55 merely ascribe penalties for not providing such information.

Commission's Determination

154. In Docket No. RT03-1-000 (Communications with Commission-Approved Market Monitors), the Commission stated that MMUs may be viewed as the “functional equivalent” of the Commission’s Staff and, as such, are not typically subject to our ex parte rules in communicating with the Commission or Commission Staff.⁷⁷ In the MBR Tariff Order, the Commission also authorized MMUs to enforce certain ISO/RTO tariff matters.⁷⁸ However, our intention in that order was that the MMU would be part of an independent entity. As we previously found, due to the composition of the current ISO Governing Board, the CAISO is not sufficiently independent to ensure operation of its interstate transmission facilities on a non-discriminatory basis.⁷⁹ As a result, we will not allow the DMA to administer the behavior-related tariff provisions discussed herein and to charge penalties for violations of those provisions until the CAISO demonstrates in a filing to the Commission that it has established an independent Governing Board in compliance with the Commission’s orders in Docket No. EL01-35-000, et al.⁸⁰ Once the Commission accepts the CAISO’s demonstration of independence, the DMA may begin to administer the proposed Enforcement Protocol and to charge certain penalties, as discussed herein, including imposing sanctions for a market participant’s failure to comply with tariff requirements. As stated in the MBR Tariff Order, the roles of the MMUs and the Commission will require Commission Staff and MMUs to continue to forge a close working relationship.⁸¹ Thus, we expect the MMUs to maintain an on-going dialogue with our Staff. While we are not requiring any changes to the CAISO organizational structure at this time, as noted above, the MMU must be adequately independent to be able to carry out these activities without interference or instruction from other ISO/RTO personnel or non-MMU supervisors. Accordingly, in its filing establishing Governing Board independence, the CAISO must demonstrate that the DMA possesses the ability to independently administer the behavior-related tariff provisions and assess penalty charges as discussed in this order and must make any necessary revisions to the MMIP in this respect. In the interim, in its compliance filing, the CAISO

⁷⁷ See Communications with Commission-Approved Market Monitors, 102 FERC ¶ 61,041 (2003).

⁷⁸ MBR Tariff Order at P 182.

⁷⁹ Mirant, 100 FERC ¶ 61,059 at P 49.

⁸⁰ See supra note 2.

is directed to modify the Enforcement Protocol to indicate that it will be enforced by the Commission. Thus, until the Commission determines that the CAISO is independent, the Commission will enforce those Rules of Conduct accepted herein which are both objectively identifiable and which require subjective evaluation.

155. We also direct the CAISO to identify, in the filing establishing Governing Board independence directed above, each individual position which currently has MMU responsibilities and propose an independent structure which includes all such positions based upon the guidance provided in this order. In addition, we direct the CAISO to clarify that it will continue to provide published reports regarding important market information (e.g., supply-demand data, market clearing prices and line outages) that enable market participants to make better informed decisions in spite of the elimination of Section 8.2 of the MMIP. We direct the ISO to explain these revisions to the MMIP. In addition, we require the CAISO to inform the Commission of the duties and responsibilities of its Compliance Unit (which also monitors activities that affect market operations and reports such activities to the ISO General Counsel), including any dual functions shared by the DMA and the Compliance Unit.

F. Proposed Confidentiality Provisions

156. The CAISO proposes to add Section 20.3.5(a) to the ISO Tariff in order to share commercially sensitive and/or confidential information with the Oversight and Enforcement Agencies. Under this proposal, the CAISO may routinely or periodically disclose information, with or without advance notice to market participants, if the following requirements are met: (1) the CAISO has identified each category of information that it intends to disclose to an Oversight and Enforcement Agency in a market notice issued at least thirty days in advance of the disclosure; (2) each category of information that the CAISO proposes to disclose is of a type wherein each market participant has access to that portion of the information pertaining to it contemporaneous with the disclosure, through each market participant's systems or records; (3) the proposed disclosure relates to the CAISO markets as a whole and is comprised of information on all market participants for which such information is available to the CAISO; and (4) each agency to which the CAISO makes such disclosure is bound legally to treat the information as confidential under terms no less protective than the requirements stated in proposed ISO Tariff Section 20.3.5(c).⁸²

⁸¹ MBR Tariff Order at P 184.

⁸² Proposed ISO Tariff Section 20.3.5(c) obligates the agency not to disclose to any third party information provided under this section without providing written notice to the ISO and the market participant that is the subject of the disclosure at least five (5)

157. Under proposed ISO Tariff Section 20.3.5(b), the CAISO states that it may disclose any information required to be maintained in confidence under the ISO Tariff to any of the Oversight and Enforcement Agencies, without meeting the requirements stated in proposed ISO Tariff Section 20.3.5(a), if certain specified requirements have been met. These requirements are as follows: (1) the ISO have a reasonable belief that a violation has occurred and that the information is relevant to the investigation, (2) the agency to which the information is provided must have authority over the potential violation and be legally bound to treat the information as confidential, and (3) the ISO must provide five business days' advance notice to the market participant of the disclosure, unless such notice would jeopardize the investigation.

158. The CAISO also states that it intends to create a secure data repository or "regulatory data server." According to the CAISO, the data server, which will be updated daily, will contain raw market and operational data delayed only a day or so to allow the ISO to generally check the integrity of the raw data.⁸³ It states that the proposed confidentiality provisions described above have been developed, in part, to provide the Oversight and Enforcement Agencies access to the same data the DMA relies on for its analyses and investigations.

Intervenors' Comments

159. CPUC and CEGB generally support the proposed provisions which provide increased access to market and investigation data because they enhance the CAISO's coordination with regulatory oversight agencies. CEGB argues that enhancing a party's access to data does not encroach upon the Commission's exclusive jurisdiction to regulate wholesale rates or otherwise modify the Commission's existing relationship with state agencies.⁸⁴

business days in advance of the intended release. The market participant may, at its sole discretion and own cost, direct any challenge to or defense against the proposed disclosure and the ISO shall cooperate as provided in proposed ISO Tariff Section 20.3.4(b).

⁸³ As an alternative, the ISO states that a secure web-based data repository that would support menu-driven downloads of data may be developed, depending on the cost of such a design and cost recovery arrangements.

⁸⁴ Citing California Public Utilities Commission v. Sellers of Long-Term Contracts, 99 FERC ¶ 61,087 (2002).

160. Duke asserts that the ISO does not explain why existing disclosure procedures are inadequate. It argues that the Commission should reject the proposed confidentiality provisions as unsupported, consistent with similar provisions the Commission rejected that would have allowed the ISO to expedite information requests and establish equity and symmetry among regulatory entities.⁸⁵ Duke requests the Commission to require the ISO to modify existing ISO Tariff Section 20.3.4(b) to require the ISO to wait at least five (5) business days after notification of the affected market participant(s) before disclosing confidential information.

161. NCPA argues that proposed ISO Tariff Section 20.3.5 would, in essence, admit the CEOB and CPUC into the ISO Control Room. NCPA further states this proposed provision is too broad in scope and appears to be designed to allow the “California Parties” to threaten prosecution of entities in the other Western states in the interest of reducing costs to California consumers who are customers of the California IOUs.

162. Metropolitan objects to this broad dissemination of confidential information because it enhances its potential disclosure. Metropolitan recommends that the provision be amended to limit the ISO’s distribution of information to agencies having statutory or regulatory responsibility for enforcement of the CAISO Tariff or antitrust law.

CAISO’s Answer

163. The ISO argues that the proposed dissemination of information is generally modeled after the disclosure provisions of the New England Power Pool Information Policy which have been approved by the Commission.⁸⁶

Commission’s Determination

⁸⁵ Citing California Independent System Operator Corp., 98 FERC ¶ 61,187 at 61,681 (2002).

⁸⁶ Citing New England Power Pool, 95 FERC ¶ 61,105 (2001); New England Power Pool, 95 FERC ¶ 61,248 (2001); Midwest Independent Transmission System Operator, Inc., 99 FERC ¶ 61,237 at 61,977 (2002); New Power Company v. PJM Interconnection, Inc., 98 FERC ¶ 61,208 (2002).

164. We will not accept the addition of ISO Tariff Section 20.3.5 as proposed herein, primarily because of the breadth of the dissemination and the lack of appropriate safeguards to protect the information. We agree with intervenors that the broad dissemination of information proposed by the CAISO increases the potential of disclosure. Thus, we direct the DMA to work closely with the Commission's Staff in formulating the appropriate vehicle through which the DMA may share data (which may be commercially sensitive and confidential) with the Commission and with the CPUC as appropriate.

G. Conformed Tariff

165. Metropolitan and CDWR assert that the CAISO has not submitted an updated version of its tariff since the filing of Amendment No. 42 in March 2002 and that many tariff provisions have taken effect since this time. These intervenors ask the Commission to require the CAISO to make available on its website a conformed version of the ISO Tariff, containing all provisions currently in effect, before the Commission grants any authority to impose penalties for violations of the ISO Tariff. CDWR further argues that the Commission should enforce compliance with the portion of the Standard of Conduct that requires transmission providers to log and post their exercise of discretion.

CAISO's Answer

166. The ISO responds that, pursuant to its proposed Enforcement Protocol, it has the authority to publish a description of a violation of the Rules of Conduct, the identity of the market participant that committed the violation, the amount of the penalty assessed, and the application of any mitigating factors. In addition, the CAISO commits to posting a current, conformed copy of the ISO Tariff on its website.

Commission's Determination

167. We agree with intervenors that market participants should not be bound by tariff requirements that are currently not found in the existing ISO Tariff as posted on the ISO's website. Therefore, we direct the ISO to honor its commitment to post an updated, conformed tariff on its website within 30 days following the acceptance of its subsequent compliance filing in this proceeding. Accordingly, penalties may not be imposed pursuant to Amendment No. 55 until this requirement and the ISO Governing Board independence requirement are met.

The Commission orders:

(A) Proposed Amendment No. 55 is accepted in part, as discussed in the body of this order.

(B) The CAISO is directed to submit a filing that demonstrates that the CAISO has established an independent Governing Board in compliance with the Commission's orders in Docket No. EL01-35-000, et al., as discussed in the body of this order.

(C) The CAISO is directed to submit a compliance filing within 60 days of the date of this order, as discussed in the body of this order.

(D) The CAISO is directed to post an updated, conformed tariff on its website within 30 days of the acceptance of its compliance filing, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.